TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 310. 62 10.

J. J. DOUGLAS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 25, 1894.

(15,490.)

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(15,490.)

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J. J. DOUGLAS, PLAINTIFF IN ERROR,

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THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1895.

1 COMMONWEALTH OF KENTUCKY:

Pleas.

Pleas before the honorables the judges of the Kentucky court of appeals, at the capitol, in the city of Frankfort, Kentucky, on the 16th day of December, A. D. 1893—Chief Justice Caswell Bennett and Associate Judges William S. Pryor and James H. Hazelrigg presiding.

Caption.

COMMONWEALTH OF KENTUCKY, Appellant,
against
J. J. DOUGLAS, Appellee.

Preamble.

Be it remembered that heretofore, to wit, on the 22nd day of July, 1892, the appellant, The Commonwealth of Kentucky, by Wm. J. Hendrick, attorney general, filed in the office of the clerk of the court of appeals aforesaid a transcript of a record in words and figures following, to wit:

2 STATE OF KENTUCKY,
Jefferson County.

Pleas before the Hon. S. B. Toney, judge of the Louisville law and equity court, at a court held at court-house, in the city of Louisville.

Parties.

THE COMMONWEALTH OF KENTUCKY, Appellant,
against
THE FRANKFORT LOTTERY, J. J. DOUGLAS, OWEN STUART, and C. F. TATUM, Appellees.
} Transcript of Record.

Be it remembered that on the 8th day of March, 1892, plaintiff filed in the clerk's office of the court aforesaid the following petition herein, to wit:

3 *Petition.*

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE FRANKFORT LOTTERY, J. J. DOUGLAS, OWEN STUART, and C. F. TATUM, Defendants.
} Petition.

The plaintiff, The Commonwealth of Kentucky, by Wm. J. Hendrick, attorney general for the Commonwealth, states that "by section 18 of an act entitled 'An act to amend and reduce into one the

several acts in relation to the city of Frankfort,' approved March 16th, 1869, it was provided that the board of councilmen of said city shall have the same franchises, power, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city school of the town of Frankfort and for other purposes,' approved February 1st, 1838; that under this act the board of councilmen were authorized to raise, in one or more classes, as to them seemed expedient, by way of lottery, any sum not exceeding one hundred thousand dollars, the money realized to be invested in safe and solvent securities, and the annual interest or profit to be appropriated for the support of the city school of Frankfort. Bond in the penalty of one hundred thousand dollars was to be executed to the Commonwealth for the faithful discharge of the duties imposed by said act, and not more than twenty per cent. of the money
4 taken in was to be reserved by said scheme. By an act approved March 28th, 1872, entitled 'An act amendatory of the laws in relation to the city of Frankfort,' it was provided that the board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell, and convey, to rent or lease, any and all property or any part thereof belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises or immunities, on such terms and for such sums and at such times as said board of councilmen shall deem for the best interests of the city of Frankfort."

That by virtue of the authority thus conferred the board of councilmen of Frankfort, on or before Dec. 31st, 1875, disposed of all lottery franchises and privileges conferred by the act of 1869; that the defendants J. J. Douglas, Owen Stuart, and C. F. Tatum are now maintaining, operating, and conducting said lottery under said charter and franchise and claiming the right so to do under and by virtue thereof.

Plaintiff states that on March 22nd, 1890, by the terms of an act entitled "An act to repeal so much of the section 18 of the act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March 16th, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved Feb. 1st, 1838, and to repeal the amendatory acts in relation to said grants, the General Assembly of
5 the Commonwealth of Kentucky repealed the charter of the Frankfort lottery and an act amendatory of the laws in relation to the city of Frankfort," approved March 28th, 1872.

That by section 235 of the constitution of Kentucky it is provided that—

"Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

Plaintiff states that the defendants are and have for more than

five months last past been exercising the privileges and franchises granted by the charter aforesaid in the city of Louisville and elsewhere, without lawful warrant, charter, or grant; that they are usurping the right, privilege, and franchise to operate a lottery under said charter, as herein set out, and continue to do so, in contempt of the Commonwealth and against her peace and dignity.

Wherefore plaintiff prays judgment of the court preventing the usurpation of said franchise, and that the defendants be excluded from exercising any and all the privileges and franchises conferred by the acts and provisions herein cited; that the court enforce its judgment by coercive process; for costs and all general and proper relief.

WM. J. HENDRICK,
Attorney General for Commonwealth.
FRANK PARSONS,
Com'th Att'y.

6 Upon said petition filed herein the following summons was issued, to wit:

Summons.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

You are commanded to summon the Frankfort Lottery, J. J. Douglas, Owen Stuart, and C. F. Tatum to answer a petition filed against them in the Louisville law and equity court by the Commonwealth of Kentucky, and warn them that upon their failure to answer within twenty days from the service hereof the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons as soon as executed.

Witness John S. Cain, clerk of said court, this 8 day of March, 1892.

JOHN S. CAIN, *Clerk.*

Upon said summons was made the following return, to wit:

Came to hand M'ch 8th, 1892, at 1 p. m.; executed M'ch 10, 1892, on the Frankfort Lottery by delivering a copy of the within summons to J. J. Douglas, manager of said lottery, he being highest officer in this county at this time; executed M'ch 10, 1892, on J. J. Douglas by delivering him a copy of the within summons; April 9, 1892, on Owen Stuart by delivering to him a copy of the within summons.

H. A. BELL, *S. J. C.*,
By W. B. THIXTON, *D. S.*

7 On the 4th day of April, 1892, the following order was entered herein, to wit:

Ord. Fil. Answer.

Came parties, by counsel, and defendants filed *its* answer and e
hibits herein.

On motion of plaintiff, ordered by the court that this case
passed to 5th inst.

Which answer and exhibits filed herein are as follows:

8

Answer.

Louisville Law and Equity Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, *vs.* THE FRANKFORT LOTTERY, &c., Defendants. } Answer of J. J. Dou las.

1. The defendant J. J. Douglas, for answer to so much of the plai tiff's petition as he is advised it is necessary for him to answer, d nies that he has for more than four months last past or for any perio of time exercised the privileges and franchises granted by the cha ters in petition named without lawful authority. He denies tha he has at any time or place usurped the right, privilege, or fra chise to operate a lottery under the charters referred to in the pet tion, or in any other manner.

2. The defendant J. J. Douglas, for further answer herein, state that he has the legal right to conduct the business, being the owne of the scheme with the right to operate by drawing the classe named in the contract hereinafter set forth, by reason of the follow ing facts:

That the General Assembly of the Commonwealth of Kentucky by an act entitled "An act for the benefit of the city schools in th town of Frankfort, and for other purposes," legally enacted and ap proved by the governor February 1st, 1838, granted to certain per sons named in said act the right to raise by way of lottery in one or more classes as to them might seem expedient a sum no

9 exceeding $100,000, to be appropriated, one half for the use and bene t of the city school in the town of Frankfort, and the other half r the construction of such reservoirs, pipes, and other works tha may be necessary to convey the water from Cove spring to the town of Frankfort; and by section 4 of said act it was provided that the managers of such lottery created by said act "shall be, and they are hereby, authorized to sell and dispose of the scheme or any class or classes of said lottery to any person or per sons who shall enter into bond to the Commonwealth of Kentucky with go d security, with condition well and faithfully to comply with all the terms and provisions of this act; which bond or bonds shall be received by the said managers, and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn, &c."

That by an act of the General Assembly of the Commonwealth

of Kentucky entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," approved February 16th, 1839, it was provided by section 26 thereof as follows:

"The fourth section of an act entitled, 'An act for the benefit of the city school for the town of Frankfort, and for other purposes,' approved February 1st, 1838, is hereby repealed and it is hereby further enacted that the managers referred to in said act, or their successors, shall be, and are hereby authorized to sell and dispose of the scheme, or any class or classes of the lottery referred to in said act, to any person or persons who shall enter into bond with
10 good security to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers, and be by them filed in the clerk's office of the Franklin county court, before said lottery or any class thereof, shall be drawn, and if said bond and security is approved and declared to be sufficient by said county court, and also by the board of trustees of the town of Frankfort, then in such case the managers shall not be individually responsible for any prize or prizes that may be drawn."

That by an act of the General Assembly of Kentucky entitled "An act in relation to the town of Frankfort," approved May 21st, 1861, it was enacted by the General Assembly as follows:

"That so much of the 26th section of an act, entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as has been repealed by a subsequent act or acts of the General Assembly of this Commonwealth, shall be, and the same is hereby re-enacted, and all subsequent acts revealing the same are hereby repealed."

That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16th, 1869, it was provided that the city of Frankfort and
11 its affairs shall be conducted by a board of councilmen to be elected and qualified under the provisions of said act, and by section 18 of said act it was enacted "that the said board of councilmen shall exercise and possess all the powers and privileges which by the general laws of the land in relation to towns and cities are granted to trustees or councilmen. Said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled "An act for the benefit of the city schools, and for other purposes," approved February 1st, 1838, and shall invest all the money realized thereunder in safe and solvent securities and may use and appropriate the interest and profits of such investment for the support of the city schools.

That by virtue of the said act the board of councilmen of the city of Frankfort were vested with the lottery franchise named.

That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory to the laws of the city of

Frankfort," approved March 28th, 1872, it was enacted by the General Assembly as follows:

"That the board of councilmen of the city of Frankfort be, and they are hereby authorized and empowered, to grant, bargain, sell and convey, to rent or lease any and all property or any part thereof, belonging to the said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises or immunities, on such terms and for such sums, and at such times as said board of
12 councilmen shall deem for the best interest of the said city of Frankfort."

That by virtue of said authority of the State of Kentucky the said board of councilmen of the city of Frankfort did execute and deliver a contract entered into on the 31st day of December, 1875, by and between the mayor and board of councilmen of the city of Frankfort, of the first part, and E. S. Stuart, of the second part, by which contract it was agreed between the parties that whereas under the said acts of the General Assembly of Kentucky the city of Frankfort had the authority to raise by a sale of this said lottery franchise the sum of $100,000; and whereas the said city of Frankfort had devised and published a scheme with sundry classes for the purpose of raising said sum of money; and whereas the said city of Frankfort by the act of March 28th, 1872, was authorized to sell and dispose of said scheme and classes upon such terms and in such manner as the said city of Frankfort might deem proper, the said city of Frankfort did, in consideration of the agreement upon the part of the said E. S. Stewart to enter into a bond with good security to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said acts, and to pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid, according to the provisions of said acts, and that said bond should be received by the city of Frankfort and approved by the county court of Franklin county, the said city of Frankfort, by its mayor
13 and board of councilmen, did sell, convey, and assign unto the said E. S. Stewart the scheme devised by said city of Frankfort under said acts, composed of 30,900 classes, not more than two of which to be drawn each day, Sundays excepted, until the whole number shall have been fully drawn, and the rights to control and operate said scheme in accordance with the provisions of said acts; in consideration of which sale, assignment, and transfer the said E. S. Stewart agreed and promised to pay to the city of Frankfort various sums of money at various times, as stated in said contract; that said contract, which was in writing, signed by the parties thereto, was duly approved, ratified, and confirmed by the general council of the city of Frankfort, which had previously authorized the making thereof. A copy of said contract is filed herewith as a part hereof, marked Exhibit A. A copy of the proceedings of the general council of the city of Frankfort relative to said contract is filed herewith as a part hereof, marked Exhibit B.

Defendant further states that the said E. S. Stewart executed a bond to the Commonwealth of Kentucky, with W. H. Way, R. W.

Meredith, W. de B. Morrill, and W. Scott Glore sureties, in the penal sum of $100,000, in accordance with the provisions of the acts of the General Assembly. Said bond provided that in consideration of the contract stated and the provisions of the acts of the General Assembly referred to the said Stewart, with his sureties, covenanted to faithfully comply with the provisions of the aforesaid acts, and also to pay all sums stipulated in the said contract to be paid to the city of Frankfort, and for the payment of all prizes that might be drawn in any class under said scheme, and the said bond was to be void upon the full compliance upon the part of the said Stewart with all the conditions of said contract. A copy of said bond is filed herewith as a part hereof, marked Exhibit C.

That said bond was received and held sufficient by the city of Frankfort, and said bond was filed in the Franklin county court, approved and held sufficient by the said court, and ordered to be recorded in the clerk's office of said court, as will more fully appear by a copy of the orders of said court upon said subject filed herewith as a part hereof, marked Exhibit D.

Defendant says that by virtue of said contract and premises named the said Stewart became the owner by purchase from the city of Frankfort, under the express authority of the State of Kentucky, of the right to said scheme and to the drawing of said classes of said lottery in accordance with the terms of said contract, which is not yet terminated; that said Stewart died domiciled in the city of Louisville, Jefferson county, Ky.; that by his last will, duly established by an order of the Jefferson county court and recorded in the Jefferson county clerk's office, his wife, Addie B. Stewart, was made sole legatee and devisee of all his estate and became the sole owner of said franchise, scheme, and contract under said will; that this defendant, J. J. Douglas, by a contract in writing, entered into with the said Addie B. Stewart for a valuable consideration, before the time of the passage of the act of the General Assembly of 1890 and of the constitutional provision cited and referred to in the petition herein, acquired the right to operate said scheme by drawing the said classes in said lottery in accordance with the terms of said contract and to the net earnings from the operation thereof, and became vested with the right to conduct, manage, and operate said lottery and to the *new* earnings resulting from the operations thereof, which could not be divested by the said acts of the General Assembly or the constitutional provision in petition referred to.

That the said E. S. Stewart and this defendant have fully complied with all the provisions of said contract, have paid all of the installments due to the city of Frankfort as the same became due and payable, and have in all respects fully performed every condition incumbent upon them under said contract and bond to the city of Frankfort, the Commonwealth of Kentucky, and all other parties therein named, and are ready and willing to fully carry out the same according to the terms, stipulations, and covenants hereof.

Defendant further states that after the execution and delivery of the said contract between the city of Frankfort and the said E. S. Stewart and before the sale, transfer, and contract by which the defendant obtained title to the said property and the right to operate said scheme by drawing said classes in said lottery according to the terms of said contract as above set forth, the Commonwealth of Kentucky,
by her attorney general, instituted an action in the Frank-
16 lin circuit court, which was, upon motion of the Commonwealth
of Kentucky, removed to the Oldham circuit court, and finally decided upon appeal from the judgment of the Oldham circuit court by the court of appeals of Kentucky; that in said action the plaintiff herein claimed that the board of councilmen of the city of Frankfort had made said contract, and that Stewart had purchased said lottery franchise and privileges, and that the defendants in the action, including the said E. S. Stewart, were engaged in selling lottery tickets under and by virtue of said alleged contract, and alleged that the sale by the city of Frankfort and the exercise of the lottery privileges by its vendees was without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming, and that the plaintiff herein in said case alleged and charged that the act of 1869 did not confer upon the city of Frankfort the lottery privileges claimed, and that the act of 1872 did not authorize the sale by the city of Frankfort of the said scheme, and that the said contract of said Stewart was null and void, and the plaintiff herein sought in said action to enjoin and oust the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights, franchises, and privileges claimed herein and sought to be annulled by plaintiff's petition, and the plaintiff herein in said action asked to cancel, annul, and adjudge void the said franchise
and rights claimed by the defendants; that issue was joined
17 upon the said allegations of the plaintiff herein in said action
and a trial had, resulting in a judgment of the Oldham circuit court in favor of the defendants in said action, which was affirmed by the court of appeals of Kentucky on the 27th day of February, 1878, and the said court of appeals of Kentucky upon appeal finally adjudged in said action that the General Assembly of Kentucky, by the act of March 18th, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the city of Frankfort was the owner thereof under said act, and that under the act of March 28th, 1872, the said city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that said act was constitutional and valid, and that the said sale was valid, and that the contract named and described herein between the said Stewart and the city of Frankfort was a valid and binding obligation, entered into in strict conformity with the said acts of the General Assembly and enforceable as such; that on the 11th day of September, 1878, the court of appeals of Kentucky in the case of J. N. Webb *vs.* The Commonwealth of Kentucky, in an action filed by the Commonwealth of Kentucky, in the nature of a writ of *quo*

warranto, to enjoin the appellants in said action from exercising the privileges of a lottery grant, adjudged that the sale of a lottery franchise under the authority of the State vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract, which could not be repealed by the
18 legislature of the State, and held *that* section 6 of article 21, chapter 28, of the Revised Statutes, which attempts such repeal, void as far as it affected the rights of the purchaser under a contract before the passage of the act.

Defendant says that he has a vested right to conduct the lottery business by drawing the classes contained in the scheme which the city of Frankfort sold and conveyed to E. S. Stewart under the terms, conditions, and covenants of the contract of December 31st, 1875, executed and delivered as aforesaid, and that there has never been at any time more than two classes in said scheme drawn in one day, and there are a large number of classes in said scheme yet to be drawn: that his said right under his said contract *were* authorized and approved by the Commonwealth of Kentucky, repeatedly adjudged valid by the judicial tribunals of this State, and such right has always been held by the courts of this State inviolable and not subject to repeal, alteration, or modification by subsequent legislatures.

Defendant says that he has paid large sums of money for said scheme devised as aforesaid and said contract, and has made contracts and incurred liabilities involving large sums of money upon the faith of said contract, and relying upon the terms thereof and upon the decisions of the courts of the State adjudging said contract to be valid, obligatory, and inviolable.

Defendant says that the said franchises named in the peti-
19 tion and the contracts for the sale of the same having been held valid, subsisting, and irrepealable by the court of appeals of Kentucky, the General Assembly of the Commonwealth of Kentucky, recognizing the correctness of such decisions, did, on the 7th of May, 1886, enact the following law:

"Every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the court of appeals to be a lawful and existing one, or the lawful grantee, licence, legatee or assignee of such franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she, or it, shall have filed with the auditor of public accounts a certified copy of the judgment rendered, and the opinion delivered by the court of appeals in a case heard and determined before it, in which has determined that a lottery could be lawfully operated under said grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license (which is hereby authorized and directed to issue on the filing of said copies hereinbefore required) reciting the filing of said copies, and authorizing the operation of said lottery for one year from the date thereof, on the condition that said license shall, within five days thereafter, pay to the said auditor of the State the sum of $2,000; and said license issued

thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the rights of the licensee to operate a lottery for the period therein named, &c."

20 By the said act the General Assembly of the State recognized the validity of the said contracts, and that they were not subject to repeal, as held by the court of appeals of Kentucky, and imposed a tax upon the same and fixed such tax at $2,000 per annum for each lottery whose franchise had been declared by a judgment of the court of appeals to be a live and existing one, and did by said act authorize said owner to operate and conduct a lottery in this Commonwealth for the period named in the license.

This defendant filed a copy of the opinion of the court of appeals rendered in the case of The Commonwealth *vs.* The City of Frankfort, &c., aforesaid with the auditor of public accounts, and did obtain from him a license year by year in accordance with said law, and this defendant has paid the State of Kentucky $2,000 annually each and every year since the passage of said act for carrying on the business under the contract stated and now complained of herein.

And the General Assembly of Kentucky, further recognizing the property rights of this defendant under his said contract, by an act of the General Assembly of the State approved May 12th, 1884, enacted that the general council of the city of Louisville should by ordinance provide for the payment of $200 per annum for every lottery office or agency therefor in the city of Louisville, which ordinance was accordingly passed by the general council of the city of Louisville and is now a valid and existing law, and this defendant has paid the city of Louisville $200 for each office oper-

21 ated by him, and at the time of the institution of this suit had paid the city of Louisville the sum of $200 for each office he then operated in advance for one year from the time of the issue of the license, and that the said licenses thus obtained have not yet expired.

The defendant says that the matters complained of in the petition have been adjudged against the plaintiff herein by court of appeals of Kentucky, and by numerous decisions of the judicial tribunals of the State the rights of the defendant herein under said contract have been fixed and determined; that the judicial department of Kentucky has uniformly, without interruption, for a series of years held and adjudged that a contract relative to a lottery franchise such as the defendant has vested in him an irrepealable right of property under a contract under the laws of this State, and has expressly so held relative to the contract under which the defendant claims; that all of the departments of the State government and of the municipal government of the city of Louisville have acquiesced at all times in such construction and acted upon it and have received large sums of money from the defendant for governmental purposes, both State and municipal, based upon such construction of the contract; that he, relying upon the decision of the courts of the State and the contemporaneous construction always given to

his said contract and contracts of the same character, made the contracts referred to and expended large sums of money and
22 has incurred liabilities to a large extent relative to the management of the said franchise and contract.

Defendant says that by reason of the premises he has a right of property lawfully vested in him under the said contract to said scheme and the drawing of the classes named in said contract, which still exist, and that the acts of 1890 referred to in the petition herein and the constitutional provision referred to in the petition are void and of no effect, so far as this defendant and his rights are concerned; that said acts and constitutional provisions are in violation of the constitution of Kentucky, in existence at the time he made his contract and acquired his rights, by which constitution it was provided that "no law impairing contracts shall be made," and also in violation of the present constitution of Kentucky, which provides "that no law impairing the obligation of contracts shall be enacted," and in violation of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts, and are therefore null and void, as they seek to impair and nullify a contract made by this defendant and those under whom he claims, under the express authority of the State, ratified and confirmed by the State, and adjudged valid and irrepealable by the courts of the State, and sanctioned for a series of years by all the departments of our Government.

3. The defendant further states that after the making of the contract between the city of Frankfort and said S. S. Stewart, as
23 set forth in the second paragraph hereof, the Commonwealth of Kentucky, by her attorney general, filed a petition in the Franklin circuit court against the city of Frankfort, the said E. S. Stewart, and others, in the nature of a writ of *quo warranto*, alleging in said petition that the said E. S. Stewart and others claiming under him were selling lottery tickets under the said grant, claiming under the contract referred to in the second paragraph herein; and further alleged that the said board of councilmen of the city of Frankfort had no title to said lottery franchise and had no authority to sell and convey the scheme as set forth in said contract, and that the defendants in said action were engaged in selling tickets under said contract in violation of law, and that the exercise of the privileges by them was injurious to public morals by tempting the people into the immoral habit of gaming, and that the said defendants were usurping the franchise, all of which matters and things are now relied upon in this action and are the identical matters for which relief is sought in this case, and that by the said petition the plaintiffs herein sought in said action to enjoin and oust the defendant therein from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights claimed herein, and the court was asked to hold the said franchise void and to annul and adjudge as cancelled all rights of the defendants therein; that said defendants filed their answer in said case and joined
issue upon the allegations of the said petition; that
4 thereafter, upon motion of the Commonwealth of Kentucky,

the said action was transferred from the Franklin circuit court to the Oldham circuit court; that in the said case such proceedings were had that the court finally entered a judgment adjudging that under the act of March 16th, 1869, referred to in paragraph 2 hereof, the city of Frankfort and the board of councilmea of said city did obtain the legal title to said lottery franchise and the classes thereof; and, further, that the said city of Frankfort, under the act of March 28th, 1872, referred to in paragraph 2, were authorized to sell and dispose of said scheme upon such terms as they deemed proper, and that said act was constitutionally valid and binding and authorized such sale and transfer, and that the contract made between the city of Frankfort and the said E. S. Stewart, which is the same contract relied upon herein, was a valid and subsisting obligation and enforceable as a legal obligation. From said judgment of the Oldham circuit court the Commonwealth of Kentucky prayed an appeal to the court of appeals of Kentucky, and the said court of appeals of Kentucky, on the 27th day of February, 1878, entered a judgment affirming the judgment of the Oldham circuit court, and adjudged in said action that the General Assembly of the Commonwealth of Kentucky, by the act of March 16th, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the said act was valid, and that the city of Frankfort, by reason thereof, was the owner of the scheme named in the contract referred
25 to, and that under the act of March 28th, 1872, the city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that the said sale to the said E. S. Stewart and the contract in relation thereto was valid and binding and had been entered into in strict conformity with the said acts of the General Assembly. A copy of the pleadings in said case and the opinions and judgments of said courts will be filed herewith as a part hereof. The defendant says that by reason of the proceedings in said action and the judgment of the courts thereupon the plaintiff is barred from bringing or maintaining this action; that the legality of the act of March 28th, 1872, and the validity of the contract of E. S. Stewart with the city of Frankfort are matters *res judicata* by reason of said judgment, and he pleads and relies upon the same herein.

Wherefore the defendant prays that the petition of the plaintiff be dismissed, and for all proper relief.

J. G. CARLISLE,
D. W. SANDERS,
MUIR, HEYMAN & MUIR,
KOHN, BAIRD & SPEKERT,
Att'ys for Def't.

26 *Exh. with Answer, Minutes City Council Frankfort.*

Extract from the minutes of the city council of Frankfort, Ky., December 31st, 1875.

Councilman Lindsay offered the following, which was adopted:

Whereas by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort" approved March 16th, 1869, and an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory of the laws in relation to the city of Frankfort" approved March 28th, 1872, this board has the authority to devise and publish a scheme with sundry classes for the purpose of raising by way of lottery the sum of one hundred thousand dollars: Now be it resolved by the mayor and board of councilmen of the city of Frankfort that they do devise and publish the following scheme and classes for said purpose, to wit:

Frankfort lottery of Kentucky.

Scheme.

To raise by way of lottery the sum of one hundred thousand dollars, the amount authorized to be raised by an act of the General Assembly of the Commonwealth of Kentucky entitled, "An act to amend and reduce into one the several acts in relation to the city of Frankfort approved March 16, 1869, which lottery is to be drawn according to said act, and also the act of the same legislature entitled "An act for the benefit of the city school of the town
27 of Frankfort and for other purposes approved February 1st, 1838. This scheme shall be composed of thirty thousand nine hundred classes, not more than two of which shall be drawn on the same day, but may be drawn on successive days (Sundays excepted) until the whole number shall have been fully drawn.

The prizes in the respective classes may vary in amount from one hundred thousand dollars to twenty-five cents. No one capital prize in any one class shall exceed one hundred thousand dollars in amount and the number of prizes in any one class shall not exceed seventy-six (76) thousand and seventy-six (76). The number of tickets in each class may vary from seventy-six thousand and seventy-six to thirty-four thousand two hundred and twenty, according to the number and amounts of the prizes contained in the respective classes. The price of tickets may be made to vary according to the number and amount of the prizes contained in each class and the composition thereof. The classes shall be drawn with 78 or 75 or 66 or 60 numbers as the case may be and the numbers to be drawn from the wheel may vary from five to twenty. The said classes shall be drawn upon the ternary system, and fifteen

per cent. shall be deducted from all prizes sold in any of the said classes.

Frankfort, Ky., this 31st day of December, 1875.

EDMUND H. TAYLOR, JR., *Mayor.*

CHAS. HAYDON,
Clerk of City Council.

And for authenticity thereof that the same may be signed
28 by the mayor of the city of Frankfort and countersigned by the clerk.

Councilman Lindsey, in compliance with resolution employing him to draw up contract with E. S. Stewart for lottery grant, reported that he had drawn up said contract and submitted the same to the board for their approval.

Ordered that, in consideration of the first payment of $1,750.00 having been made, the mayor is directed to execute the contract, which is approved by this board on behalf of the city; and Mr. E. S. Stewart being present, thereupon said contract was executed by him and his honor the mayor and attested by the clerk in the presence of this board, and which contract reads as follows:

This article of agreement made and entered into this 31 day of December 1875 by and between the mayor and board of councilmen of the city of Frankfort of the first part and E. S. Stewart of the second part, witnesseth, that whereas it is believed that by virtue of the eighteenth section of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort."

Approved March 16th, 1869, and an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory of the laws in relation to the city of Frankfort," approved March 28th, 1872, the parties of the first part have the authority to raise by way of lottery the sum of one hundred thousand dollars; and
29 whereas the parties of the first part have pursuant to said acts and the authority alleged to be thereby conferred devised and published a scheme with sundry classes for the purpose of raising by way of lottery the said sum of money which scheme with the classes read as follows, to wit:

Frankfort lottery of Kentucky.

Scheme.

To raise by way of lottery the sum of one hundred thousand dollars, the amount authorized to be raised by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16, 1869, which lottery is to be drawn according to said act, and also an act of the same legislature entitled "An act for the benefit of the city school of the town of Frankfort and for other purposes," approved February 1, 1838.

This scheme shall be composed of thirty thousand nine hundred classes not more than two of which shall be drawn on the same day, but may be drawn on successive days, (Sundays excepted) until the whole number shall have been fully drawn. The prizes in the respective classes may vary in amount from one hundred thousand dollars to twenty-five cents. No one capital prize in any one class shall exceed one hundred thousand dollars in amount, and the number of prizes in any one class shall not exceed seventy-six (76) thousand and seventy-six (76). The number of tickets in each class may vary from seventy-six thousand and seventy-six to
30 thirty-four thousand two hundred and twenty according to the number and amounts of the prizes contained in the respective classes. The price of tickets may be made to vary according to the numbers and amounts of the prizes contained in each class and the composition thereof. The classes shall be drawn with 78 or 75 or 66 or 60 numbers as the case may be and the numbers to be drawn from the wheel may vary from five to twenty. The said classes shall be drawn upon the ternary system and fifteen per cent. shall be deducted from all prizes sold in any of the said classes.

Frankfort, Ky., this 31st day of December, 1875.

E. H. TAYLOR, JR.,
Mayor of the City of Frankfort.

CHAS. HAYDON,
Clerk of City Council.

And whereas by the eighteenth section of said act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort" approved March 16, 1869, the act entitled "An act for the benefit of the city school of the town of Frankfort and for other purposes," approved February 1, 1838, and the act entitled "An act amendatory of the laws in relation to the city of Frankfort," approved March 28, 1872, the parties of the first part are authorized to sell and dispose of the scheme or any class or classes of said lottery to any person or persons who shall enter into bond with good security to the Commonwealth of Kentucky with condition well and faithfully to comply with all the terms and provisions of the said acts hereinbefore named and specified to
31 pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid according to the provisions of said acts as hereinbefore named and specified which bond shall be received by the parties of the first part and be by them filed in the clerk's office of the Franklin county court before the lottery or any class thereof shall be drawn, and if said bond and security is approved and declared to be sufficient by the said county court and also by the board of council of Frankfort then and in such case the parties of the first part shall not be responsible for any prize or prizes that may be drawn. Now the parties of the first part have this day and do by these presents sell unto the party of the second part the scheme and classes aforesaid to him his heirs

hereby authorize the said party of the secon
part his heirs and assigns to draw said lottery under said schem
and classes as fully and to all intents and purposes as the parties
the first part are authorized or empowered to do by the provisio
of the said acts hereinbefore named and specified provided alwa
that the party of the second part his heirs and assigns in drawin
the classes of said lottery shall in all respects draw the same a
cording to and in conformity with the provisions of the said ac
aforesaid and according to the *principals* laid down in the schem
and classes aforesaid. In consideration of which the party of th
second part binds himself his heirs executors, administrators an
assigns to pay to the parties of the first part the following sums
money at the following times to wit:

32 $1,750 cash in hand on the execution of this contrac
which is hereby acknowledged to have been paid.
$1,750 on the first day of April, 1876.
$1,750 on the first day of July, 1876.
$1,750 on the first day of October, 1876.
$1,750 on the first day of January, 1877.
$1,750 on the first day of April, 1877.
$1,750 on the first day of July, 1877.
$1,750 on the first day of October, 1877.
$1,750 on the first day of January, 1878.
$1,750 on the first day of April, 1878.
$1,750 on the first day of July, 1878.
$1,750 on the first day of October, 1878.
$1,750 on the first day of January, 1879.
$1,750 on the first day of April, 1879.
$1,750 on the first day of July, 1879.
$1,750 on the first day of October, 1879.
$1,750 on the first day of January, 1880.
$1,750 on the first day of April, 1880.
$1,750 on the first day of July, 1880.
$1,750 on the first day of October, 1880.
$2,500 on the first day of January, 1881.
$2,500 on the first day of April, 1881.
$2,500 on the first day of July, 1881.
$2,500 on the first day of October, 1881.
$2,500 on the first day of January, 1882.
$2,500 on the first day of April, 1882.
33 $2,500 on the first day of July, 1882.
$2,500 on the first day of October, 1882.
$2,500 on the first day of January, 1883.
$2,500 on the first day of April, 1883.
$2,500 on the first day of July, 1883.
$2,500 on the first day of October, 1883.
$2,500 on the first day of January, 1884.
$2,500 on the first day of April, 1884.
$2,500 on the first day of July, 1884.
$2,500 on the first day of October, 1884.
$2,500 on the first day of January, 1885.

$2,500 on the first day of April, 1885.
$2,500 on the first day of July, 1885.
$2,500 on the first day of October, 1885.
$1,875 on the first day of January, 1886.
$1,875 on the first day of April, 1886.
$1,875 on the first day of July, 1886.
$1,875 on the first day of October, 1886.
$1,250 on the first day of January, 1887.
$1,250 on the first day of April, 1887.
$1,250 on the first day of July, 1887.
$1,250 on the first day of October, 1887.
$1,250 on the first day of April, 1926, and
$1,250 on the 31st day of December, 1926.

Said several installments shall be paid as they respectively fall due without any rebate discount or deductions whatever, on any thereof for any interference as hereinafter mentioned which may occur after such instalment or instalments have been paid or become due to the treasurer of the city of Frankfort, and his receipt therefor countersigned by the clerk of the city of Frankfort shall be good and sufficient evidence of any and all payments. It is agreed however that in the event the said party of the second part his heirs or assigns are at any time prevented or hindered from drawing said lottery or any class or classes thereof in this State by judicial or legislative proceedings, he shall not be required to pay any instalment or instalments, falling due during the time in which he may be so prevented or hindered until such prevention or hindrance is removed. Provided that the party of the second part shall by notice in writing served upon the mayor of the city of Frankfort notify the parties of the first part of the date of the commencement of any such interference when the time of the computing of the interference shall commence from the date of said service of such notice and continue only so long as such prevention or hindrance as aforesaid shall actually exist. And it shall be the duty of the party of the second part to notify in writing the parties of the first part of the removal or cessation of such prevention or hindrance immediately thereon, and provided further in case of any such interference as aforesaid the actual time of duration of such hindrance or prevention shall not be computed in the drawings of the classes aforesaid, if no such drawings are in fact made during said time and all of the said payments hereinbefore enumerated which shall fall due after the commencement of such interferences shall be respectively postponed for the same length of time of said interference and become due and payable accordingly.

It is further agreed that in the event the party of the second part, his heirs, assigns, or representative shall for the space of thirty days after any of said instalments shall become due fail to pay the same, the parties of the first part shall have the power at their discretion to declare this contract at an end and cancel the same by notice to the party of the second part but such cancellation shall

not deprive the parties of the first part of their right under this co
tract to collect any and all of said instalments then or past due.

It is further agreed that the party of the second part his heirs a
signs or personal representatives shall have the right to draw th
whole number of the classes provided for in said scheme unless thi
contract be cancelled as aforesaid it being the intention that th
party of the second part has purchased the entire scheme and al
the classes thereof, subject to the restrictions and qualification
herein contained, to be drawn by him upon the principles an
within the limitations prescribed in the scheme and the acts of th
legislature aforesaid. Provided however and it is expressly under
stood that nothing herein contained shall be construed as a guar
antee on the part of the parties of the first part of the validity o
the lottery grant herein mentioned and referred to or as to the cor
rectness of the said scheme and classes under the acts men-
36 tioned and specified, or as to their power to dispose of said
scheme and classes.

It is further understood and the party of the second part
hereby agrees and binds himself his heirs, assigns and personal
representatives to pay all the prizes drawn by any person or persons
from time to time in any of the classes aforesaid according to the
provisions of the said acts hereinbefore named and specified. The
party of the second part hereby agrees for himself, his executors,
administrators and heirs that should he make any assignment of
this contract then in that event he and any and all assignees under
him shall give notice thereof to the party of the first part by filing
a copy of said assignment with the clerk of the city council of the
city of Frankfort.

It is further agreed that if at any time it becomes necessary that
this contract shall be amended so as to secure to each party their
rights under the same according to the intent of this contract the
parties hereto agree and bind themselves to do so.

In witness whereof the parties hereto have subscribed their names
at this Frankfort Kentucky the day and date above written, the
marginal note on the tenth (10th) page commencing with the word
"and" and ending with the word "accordingly" inserted before
the signing hereof.

E. S. STEWART.
EDMUND H. TAYLOR, JR., *Mayor.*

Attest: CHAS. HAYDON, *City Clerk.*

37 CITY OF FRANKFORT:

OFFICE OF CITY CLERK.

I, Chas. G. Payne, clerk of the board of councilmen of the city of
Frankfort, do hereby certify that the above and foregoing is a true
and correct copy of the contract between the city of Frankfort and
E. S. Stewart as appears on the minute book of the said council now
on file in my office.

In testimony whereof I hereto sign my name and cause the seal

of the city of Frankfort to be attached thereto. Done at
[SEAL.] Frankfort this 10th day of March, A. D. 1892.

CHAS. G. PAYNE, *City Clerk.*

38

Bond.

Bond of the Frankfort Lottery Company.

"Know all men by these presents that we, E. S. Stewart, principal, and W. H. Way, R. W. Meredith, and W. de B. Morrill, sureties are held and firmly bound to the Commonwealth of Kentucky, in the penal sum of one hundred thousand ($100,000) dollars, to be paid to the said Commonwealth for the payment of which well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators firmly by these presents, dated this 31st day of December, in the year A. D. 1875.

"The condition of the above obligation is such that, whereas, by certain acts of the General Assembly of the Commonwealth of Kentucky, viz: one act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' Session Acts 1869, vol. 2, chap. 2, 167, sec. 18 act 1869 approved the 16th day of March, 1869, and an act entitled 'An act amendatory to the laws in relation to the city of Frankfort,' approved March 28, 1872, chapter 889, Session Acts of 1871–'2, vol. 2, page 393, and certain acts and amendments of acts therein referred to, the board of councilmen of the city of Frankfort were authorized by way of lottery, in one or more classes, to raise any sum not exceeding one hundred thousand dollars, and to sell and dispose of the scheme or any class or classes of the lottery referred to in said acts to
39 any person or persons, who shall enter into bond with good security to the Commonwealth of Kentucky with condition well and faithfully to comply with all the terms and provisions of said acts and amendments.

"And, whereas, said board of councilmen did on the 31st day of December, 1875, devise a scheme under which (30,900) thirty thousand and nine hundred classes should be drawn under said lottery grant, for the purpose of raising one hundred thousand ($100,000.00) dollars, authorized to be raised by said above-mentioned acts of the General Assembly of the Commonwealth of Kentucky, and also other acts therein referred to.

"And whereas, the said board of councilmen of the city of Frankfort, on the 31st, day of December, 1875, did sell and transfer unto E. S. Stewart, his heirs, executors, administrators and assigns, the scheme aforesaid and all the classes thereof and pertaining thereto, and the exclusive right to draw the same and conduct the drawing of any and all classes of said scheme during the period to be begun and ended as in said agreement of sale and transfer, are fully written and set out, that is, until the whole number of said classes shall have been drawn or until the sum of one hundred thousand ($100,000.00) dollars shall have been raised for the purposes mentioned in said scheme and the acts first above mentioned.

"And, whereas, the said E. S. Stewart, as by said articles of agreement between him and said board of councilmen will more
40 fully appear, is required, before he shall begin — draw any classes in said scheme set out and mentioned, or exercise any right or power conferred on them by the articles, to execute a bond to the Commonwealth of Kentucky, with good and sufficient surety in the penal sum of one hundred thousand ($100,000.00) dollars, conditioned well and faithfully to comply with all the terms and provisions of the aforesaid acts, and also for the payment of the sums stipulated to be paid in said contract, and for the payment of all prizes that may be drawn in any class under said scheme, and of all other expenses that he may be subject to as the vendor of said scheme.

"Now, therefore, if the said E. S. Stewart shall well and faithfully comply with all the terms and provisions of said acts of the General Assembly of the Commonwealth of Kentucky and shall well and truly perform all the covenants upon him binding in said contract and agreement before mentioned, and shall pay to said board of councilmen of the city of Frankfort and their successors the sums in said agreement set out as to be paid by him to said board of councilmen at the several times and in the manner therein mentioned, and shall pay any and all prizes that may be drawn in any and all classes under said scheme, in said agreement mentioned, during the existence thereof, and all expenses and charges of every kind that may accrue in the management of said scheme during the existence of the said above-named agreement, without subjecting the above-mentioned board of councilmen or their successors to any responsibility for any part of the above-named charges and
41 expenses, whether for the payment of prizes or any other expenses of any other name or nature arising during the existence of said agreement. Upon the full compliance with the above conditions by the said E. S. Stewart, then this obligation shall be void and of no effect, otherwise, to be and remain in full force, virtue and effect.

"In witness whereof we have hereunto set our hands and seals, this 31st day of December, A. D. 1875.

"E. S. STEWART. [L. S.]
"W. H. WAY. [L. S.]
"R. W. MEREDITH. [L. S.]
"W. DE B. MORRILL. [L. S.]
"W. SCOTT GLORE, [L. S.]
"By A. DUVALL,
His Attorney-in-fact."

Franklin County Court.

MONDAY, *May* 20, 1876.

This day came Chas. Haydon, clerk of the board of councilmen of the city of Frankfort, Kentucky, and filed the following papers, viz: consent of W. de B. Morrill and R. W. Meredith, of date May 18, 1876, relating to the substitution of W. Scott Glore

as security of E. S. Stewart on his lottery bond, of date December 31, 1875, in lieu of W. H. Way; the affidavits of W. Scott Glore and F. R. Bishop as to the sufficiency of said Glore as security, and a power of attorney from said Glore to A. Duvall authorizing and empowering said Duvall, as his attorney-in-fact, to sign,
42 execute, and acknowledge said bond as such security, and asked that the same, together with said bond, when so executed, be ordered to record in the clerk's office of this court, which is done; and thereupon came Alvin Duvall, attorney for E. S. Stewart, the principal in said bond, and W. H. Way, one of the securities therein, and moved the court to be allowed to withdraw the name of said Way as security on said bond and to substitute W. Scott Glore as security thereto in lieu of said Way, and produced the order of the board of council of the city of Frankfort, Kentucky, consenting to such change, provided the same be approved by this court; and such motion, being heard, is sustained, and therefore A. Duvall, in open court, as the attorney-in-fact for said W. Scott Glore and in his name, signed, executed, and acknowledged said bond as security as aforesaid.

A copy.

(Attest:)

JAS. G. CROCKETT, *C. F. C. C.*,
By HOWARD JETT, *D. C.*

43 The following are the two decisions of the court of appeals of Kentucky referred to in the foregoing statement:

Opinion Court of Appeals.

Kentucky Court of Appeals.

FRANKFORT, *February* 27, 1878.

COMMONWEALTH OF KENTUCKY
vs.
CITY OF FRANKFORT, &c. } Oldham.

Judge ELLIOTT delivered the opinion of the court as follows:

In 1876 the attorney general of the State filed a petition in the me of the appellant in which it charged that the board of coun-men of the city of Frankfort claimed that it had an unexhausted gislative privilege to raise large sums of money by running and erating a lottery for the benefit of the city school of Frankfort. is further charged that the board of councilmen of the city of ankfort claim that by legislative authority it has the authority sell and transfer the lottery privileges, and that in 1875 it did un-rtake to sell and convey to one Stewart its pretended lottery fran-ses and privileges, and that Stewart has sold to others who are gaged in selling lottery tickets, etc., and that appellee Pepper l others, under the name and style of the "Kentucky *Chas* Dis-ution Company," proposed to have a grand drawing of prizes the 1st of August, 1876.

It is further charged that Pepper and others have adver-
44 tised this drawing extensively and are engaged in the sale of tickets by thousands at twelve dollars for a whole ticket, six dollars for a half ticket, and at the same ratio for a smaller fraction of a ticket, and that they propose a distribution of several hundred thousand dollars to the lucky drawers of prizes. It is further charged that in 1838 the legislature of this State authorized one hundred thousand dollars to be raised by way of lottery, to be expended for the benefit of the city school of Frankfort and for the erection of the proper machinery by which to supply the city with water, to be conveyed from the Cove spring.

It is, however, charged that the amount authorized to be raised by the act of 1838 has long since been received by the proper city authorities, and that the attempted sale by the city and the exercises of lottery privileges by its pretended vendees are without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming.

The appellant made The Councilmen of the City of Frankfort, The City School Trustees, and Stewart and others defendants, and asked the court to enjoin the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, and finally the court was asked to cancel, annul, and adjudge void the privileges claimed by the appellees.

The defendant- demurred to the appellant's petition. The
45 court overruled the demurrers except so far as the suits ought to effect the rights of the parties under and by virtue of the act of 1838; but, on refusal of the attorney general to make the board of managers of the lottery privileges granted in 1838 parties, the suit was dismissed so far as it affected defendants' rights under that act.

This is an ordinary action brought to prevent the usurpation of a pretended franchise and is authorized by section 529 of the former Code of Practice, as was decided by this court in the case of The Commonwealth *vs.* The City of Frankfort and others (13 Bush., p. 186).

The Board of Councilmen answered the petition of appellant and asserted its right to operate a lottery by legislative grant for the support of the city schools of Frankfort, and the other defendants claimed as beneficiaries or vendees of the said board of councilmen.

On hearing, the lower court dismissed appellant's petition, and that judgment is here for revision. On the first day of February, 1838, the legislature by its enactment vested in a board of managers the right to raise by way of lottery one hundred thousand dollars in one or more classes, as to them might seem proper. One-half of this sum was to be appropriated "to the use and benefit of a city school in the town of Frankfort, and the other half for the construction of such reservoirs, pipes, and conductors as may be necessary and proper to convey the water from the Cove spring into said town."

The second section provides that the managers shall not reserve more than twenty per cent. of the prizes, and the fourth section authorizes the managers to dispose of the entire lottery scheme or any classes thereof for not less that ten per cent. of the prizes proposed to be drawn.

On the 16th of March, 1869, the legislature passed an act entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort." By this act the legislature, instead of trustees, established a board of councilmen and vested in them the legislative authority of the city, and in the 18th section of said act it is provided that "said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in the act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February 1st, 1838, and shall invest all money realized thereunder in safe and solvent securities, and may use and appropriate the interest and profits of such investments for the support of the city school." The act referred to by this act of 1869 is the act of 1838, which granted to the managers therein named a lottery franchise or privilege till *it by* one hundred thousand dollars were raised for the benefit of the city school and the water works of Frankfort; and by the act approved March 28th, 1872, the board of councilmen of the city of Frankfort are authorized to sell and transfer all property or franchises belonging to the city, and by these several acts it is claimed that the board of councilmen have a clear legislative grant of the right to raise one hundred thousand dollars by way of lottery, and that neither they nor their vendees can be operating or running a lottery in violation of law till the authorized sum has been raised, which has not been done.

If, therefore, the act of February 1st, 1838, granted to the managers therein named a lottery franchise, it seems to us that the act of March 16th, 1869, also granted one to the board of councilmen of the city of Frankfort, for it says that "said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city school of the town of Frankfort, and for other purposes,' approved February 1st, 1838," and as the franchises, powers, and authority conferred on the managers by the act of February 1st, 1838, embraced the right to raise $100,000 by way of lottery, the franchises, powers, and authority of the board of councilmen of the city of Frankfort will not be the same as that conferred on the managers by the act of 1838 unless they also embrace a lottery privilege or the right to raise $100,000 by way of lottery.

The word same may be synonymous with that of identical, but more generally synonymous with equal or exactly similar. We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers, and authority equal or exactly similar to those that had, by the act of 1838, been conferred on the managers, which included the privilege of raising $100,000 by operating a lottery. It is very common in the acts incorporating turnpike companies

to confer on them the same franchises, powers, and privileges as had been conferred by the legislature on some other turnpike company, and nobody ever dreamed that by such enactments the legislature either intended or did transfer the franchises of the companies referred to to the companies it was incorporating.

Suppose, for instance, that the legislature had enacted that the Owingsville and Sharpsburg Turnpike Road Company shall have the same powers, privileges, and franchises as are conferred upon the Mt. Sterling and Paris Turnpike Road Company by an act which is specifically identified by its title, etc., can it be contended that by the passage of such an act the franchises, etc., of the Mt. Sterling and Paris Turnpike Company are transferred to the Owingsville and Sharpsburg Turnpike Company? We think not; but such an act would confer upon the Owingsville and Sharpsburg Turnpike Company powers, privileges, and franchises similar to those which had been conferred on the Mt. Sterling and Paris Turnpike Company by the previous act referred to.

It is quite common for the legislature when creating one corporation to confer on it the same powers and privileges that have been conferred on a similar corporate company by a previous act, and yet it has never been contended that this legislation transfers the franchises of the corporation referred to to the one being created. It only confers similar powers, franchises, etc., on the corpo-
49 ration to those that had been conferred on the one that was referred to as then existing.

Besides, the fair presumption at the date of the act of 1869 would have been that the lottery franchises granted to the managers by the act of 1838 had been exhausted, and we cannot assume that the legislature intended to confer on the board of councilmen of the city of Frankfort a franchise which it was reasonable to presume had been exhausted from the age of the grant and other circumstances.

But it is contended that the 18th section of the act of March 16, 1869, in so far as it attempts to confer a lottery privilege, is in contravention of the 37th section of article 2 of the constitution of this State, and therefore void, which section is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

In commenting on similar constitutional provisions of other States Judge Cooley, in his work on Constitutional Limitations, says: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, which is fairly indicated by its title: to require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. It has accord-
50 ingly been held that the title of "An act to establish a police government for the city of Detroit" was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxa-

tion for its support and courts for the examination and trial of offenders, might constitutionally be included in the bill under this title. The generality of the title is therefore no objection to it, so long as it is not made a cover to legislation incongruous to itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute and how much particularity shall be employed in the title in defining it."

The act assailed as being unconstitutional is entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," and it is provided in the 18th section that the same franchises, powers, and authority are conferred on the board of city councilmen as are conferred on the managers in an act entitled "An act for the benefit of the city school of the town of Frankfort, and for other purposes," approved February 1, 1838, and shall invest all money realized thereunder in safe and solvent securities and may use and appropriate the interest and profits of such investment for the benefit of the city school.

The question is whether, under the title of an act to amend
51 and reduce into one the several acts in relation to the city of Frankfort, the legislature can provide for raising the means by taxation, lottery, or otherwise for the education of *of* the children of the city.

We are of the opinion that the provisions of the 18th section of the law are covered by its title. Many acts had been passed by the legislature which related to the city of Frankfort, and, amongst others, an act establishing a city school and authorizing a lottery to be operated for its be-efit, and the object of the act of 1869 was to amend and reduce all these laws into one act, and therefore, by the title of this act, the members of the legislature were notified that all acts relating to the city of Frankfort, as well her educational as other laws, were to be amended and reduced into one.

By an act entitled "An act to amend the charter of the Cincinnati and Covington Bridge Company," the legislature increased the capital stock of the company $700,000 and authorized it to sell $100,000 of its stock to the city of Covington, and authorized the city of Covington to raise the $100,000 by a sale of its bonds and tax its people to pay the interest on them, and yet this court has held that it relates to but one subject, which was expressed in the title. This court has repeatedly held that the provision of the constitution should receive a liberal and not technical construction, and that no provision of a statute relating directly or indirectly to the subject expressed in the title having a natural connection therewith and not foreign to the same should be deemed within the constitutional inhibition. But should any doubt still exist as to whether the 18th section of the act of 1869, *supra*, is covered by its title, they should be forever put to rest by the decision of this court in the Louisville lottery cases, in which it was decided that under the title of an act to establish a public library for the city of Louisville the legislature had the power and

did vest in the library corporation lottery privileges that enabled it to sell the grandest schemes and have the largest lottery drawings ever witnessed in our State; and as this lottery privilege was unanimously decided by this court to be germane to the Louisville library title, it will not do to say that a lottery franchise is not germane to the act of 1869, *supra*.

Certainly the education of the youth of Frankfort related not only to the city, but to its future prosperity and welfare, and we are of opinion that the provisions of the 18th section of the act of 1869 were fully covered by its title when construed in the light of the decisions of this and other courts of the Union; and as the evidence does not indicate that the lottery franchise has been exhausted, we are of opinion that the court on hearing properly dismissed the appellant's petition.

If the lottery privilege is immoral in its tendency the legislature must interfere. This court can construe and decide what
53 the law is, but has no power either to make a law or repeal one already made by judicial construction.

Wherefore the judgment of the court below is affirmed.

Kentucky Court of Appeals.

FEBRUARY 27, 1878.

COMMONWEALTH, Appellant, *vs.* CITY OF FRANKFORT, &c., Appellees. } Appeal from a Judgment of the Oldham Circuit Court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said said judgment be affirmed.

Which is ordered to be certified to said court.

A copy.

(Attest:)

T. C. JONES, *C. C. A.*,
By VIRGIL HEWITT, *D. C.*

At a court held on the 5th of April, 1892, the following order was entered herein:

Came parties, by counsel, and by consent ordered by the court that this case be passed to 9th inst.

Also, on the 5th day of April, 1892, the following order was entered in action No. 33728½, Commonwealth of Kentucky *vs.*
54 Henry Academy and Female College, &c., which also refers to this action, as follows:

Ord. Fil. Gen'l Dem'r & Dem'r to 1st, 2nd, & 3rd Paras. Answer.

Plaintiff, by counsel, filed a general demurrer and a demurrer to the 1st, 2nd, and 3rd paragraphs of the answer herein, and by consent of parties said demurrers are to apply and be heard in the case of The Com'th of Ky. *vs.* The Frankfort Lottery Co., J. J. Douglas, &c., No. 35719½, as to the answer filed herein.

By consent of parties, ordered by the court that said demurrer- be set to the 9th inst. for hearing.

Which demurrers to the answer filed herein are as follows:

D'm'r Ans.

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
FRANKFORT LOTTERY COMPANY, &c., Defendants. } Demurrer.

Now comes the plaintiff, The Commonwealth of Kentucky, and demurs to the answer of J. J. Douglas, filed herein, because said answer does not state facts sufficient to have or maintain a defense to the plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

WM. J. HENDRICK,
Attorney General.

Dem'r 1st, 2nd, & 3rd Paras. Ans.

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
55 FRANKFORT LOTTERY COMPANY, &c., Defendants. } Demurrer.

Plaintiff demurs to the first paragraph of the answer of J. J. Douglas, because said paragraph does not state facts sufficient to have or maintain defense to the plaintiff's petition.

Second. The plaintiff demurs to the second paragraph of defendant's answer, because said second paragraph does not state facts sufficient to have, maintain, or constitute a defense to plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

Plaintiff demurs to third paragraph of answer, because said third paragraph does not state facts sufficient to maintain or constitute a defense to plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

WM. J. HENDRICK,
Attorney General.

At a court held on 9th of April, 1892:

Came parties, by counsel, and the argument on the general and special demurrers to the answer herein having been heard in part, and there not being time to conclude on today, ordered by the court said argument be continued to Monday morning next at 10 o'clock.

Ord. Sub. Dem'rs Ans.

At a court held on 12th of April, 1892:

Came parties, by counsel, and the demurrers to the answer
56 being heard *was* submitted, and the court, not being advised, takes time.

Ord. Fil. Opinion; Ord. Ovrlg Dem'rs Ans; Ord. Dis. Pet. & Judg't; Ord. App'l.

At a court held on 12th of May, 1892:

Came parties, by counsel, and the court filed an opinion herein.

And this cause being heard on the plaintiff's demurrers to the answer of J. J. Douglas, filed herein, and the court being sufficiently advised, it is adjudged that the demurrers to the answer of defendant J. J. Douglas be, and they are hereby, overruled; to which ruling of the court *that* plaintiff excepts; and, the plaintiff declin*gin* to plead further, it is adjudged that plaintiff's petition be dismissed; to which ruling of the court plaintiff excepts and prays an appeal to the court of appeals, which is granted.

Which opinion, filed herein, is as follows:

57

Opinion.

In the Louisville Law and Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE HENRY ACADEMY AND FEMALE COLLEGE LOTTERY, J. J. DOUGLAS, OWEN STEWART, and C. F. TATUM, Defendants.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE FRANKFORT LOTTERY COMPANY, J. J. DOUGLAS, OWEN STEWART, and C. F. TATUM, Defendants.

These two actions are heard together. Each one is a proceeding in the nature of a *quo warranto* instituted by the attorney general on behalf of the Commonwealth against the defendants under sections 480, 481, 483, 485, and 487 of the Civil Code, to prevent the usurpation of a franchise and to compel the defendants to show by what warrant or authority they or any of them claim to exercise the lottery franchises under which they are operating said lottery grants.

The defendant J. J. Douglas has filed his separate answer to each of said petitions; to which said answers the Commonwealth has demurred. This submission of said two actions is upon the said demurrers of the Commonwealth to said answers of the defendant J. J. Douglas.

1. The old writ of *quo warranto* originally was at common law a

civil writ at the suit of the Crown, as *custos morum* of the
58 nation, and was not a criminal prosecution, although it was originally returnable only in the court of King's Bench. 5 Bac. Abr. Information (A). Whether, however, it was originally a civil or criminal proceeding has been much controverted. In the case of Rex *vs.* Bennett, mayor of Shaftsbury, Tr. 4, G. 1, the twelve judges were equally divided upon this question, and, what was quite remarkable, two upon each bench were of different opinions, Parker, Bury, Powys, Blencour, Dormer, and Fortesque holding that it was criminal, while King, Tracey, Price, Ayer, Pratt, and Montague that it was a civil suit. At any rate, whether civil or criminal, it was directed against the person or persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the Crown to inquire by what authority they maintained their claim. The judgment upon this writ was that the franchise, liberty of privilege, *capiatur* in *manum domini regis*. On account of the delay and technical difficulties attendant upon the prosecution of the writ of *quo warranto* it fell into disuse in England and gave way to a more expeditious statutory mode of proceeding under various acts of Parliament, the 4th and 5th of William and Mary and 9th Ann, to wit, to an information filed by the King's attorney general in the nature of a *quo warranto*, in which the person or persons usurping were considered as offenders punishable by fine. 2 Wheaton's Selwyn, 322–324. The process upon an information in the nature of a *quo warranto* was either a *venire facias* and *distringas* or a subpœna
59 and attachment. It was irregular to proceed against the defendants by rule to appear.

People *vs.* Richardson, 4 Cowan and the note.

The common-law writ of *quo warranto* and the English statutory proceeding by information in nature of a *quo warranto* has been much simplified in Kentucky under sections 480, 481, 483, 485, and 487 of the Civil Code of Procedure, which provides as follows: "Section 480. That in lieu of the writs of *scire facias* and *quo warranto* or of an information in the nature of a *quo warranto*, ordinary actions may be brought to vacate or repeal charters and to prevent the usurpation of an office or franchise." Section 483. "If a person usurp an office or franchise the person entitled thereto or the Commonwealth may prevent the usurpation by an ordinary action." And section 485. "For usurpation of other than county offices or franchises the action by the Commonwealth shall be instituted and prosecuted by the attorney general." And section 481. "The action to repeal or vacate a charter shall be in the name of the Commonwealth and be brought and prosecuted by the attorney general, or, under his sanction and direction, by an attorney for the Commonwealth," and section 487 provides, as to the judgment in such actions, that "a person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court. * * * And the court shall have power to enforce its judgment by causing the books and papers and all other things pertaining to the office or

franchise to be surrendered by the usurper, and by preventing him from further exercising or using the same, and may enforce its orders by fine and imprisonment until obeyed."

The petitions in the two cases at bar are almost identical and are filed under the sections of the civil code above quoted and are founded upon section 226 of the present constitution of Kentucky, which provides that "lotteries and gift enterprises are prohibited, and no privileges shall be granted for such purpose, and no scheme for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked;" and also upon the act of the legislature approved March 22, 1890, entitled "An act to repeal so much of section 18 of the act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,'" approved March 16, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort, and for other purposes," approved February 1, 1838, and to repeal the amendatory acts in relation to the said grants, approved March 28, 1872. Upon these provisions of the present constitution and the said acts of the General Assembly, above referred to, the Commonwealth states that the defendants are exercising the privileges and franchises as originally granted without lawful warrant; that they are usurping the right, privilege, and franchise to operate lotteries under said original
61 grants in contempt of the Commonwealth and against her peace and dignity, and the Commonwealth prays for a judgment of ouster preventing the usurpation of said franchises by the defendants, and that the defendants be excluded from exercising any and all the privileges or franchises as originally conferred by the act of the legislature, and for costs, and for all general and proper relief.

In his answer to the proceeding against the Henry Academy and Female College lottery, the defendant J. J. Douglas denies that on the 22nd of March, 1890, by the act of the legislature referred to in the petition, the privileges conferred by the act of 1850 were repealed, and denies that such was the effect of the constitutional provision referred to in plaintiff's petition, and he sets up the following facts as a special plea in bar to the petition: That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act for the benefit of the Henry Academy and Henry Female College," approved December 9, 1850, it was provided that certain persons therein named as managers were granted the right by way of lottery to raise in one or more classes, as to them might seem most expedient, any sum not to exceed $50,000.00, to be appropriated to the use and benefit equally of the Henry Academy and Henry Female College, located at Newcastle, in the county of Henry, in the State of Kentucky; that by section 3 of said act it is provided that "said managers shall be, and are hereby, authorized to sell and dispose of said schemes or any class thereof to any

person or persons who shall enter into bond with good
62 security, conditioned well and faithfully to comply with all the terms and conditions of this act, payable to the Commonwealth of Kentucky, which bond or bonds shall be received by said managers and be by them filed in the said Henry county court before said lottery or any class thereof shall be drawn;" that by virtue of said act the managers named therein did sell and convey by contract, in writing, to one Walter Gregory, on the 19th day of December, 1850, the right to operate under said scheme by drawing the classes named therein, and that the said managers of the lottery did by the said contract sell, dispose, assign, and set over to said Walter Gregory the sole right to draw the scheme or schemes of the lottery franchise conferred by said act as he should from time to time deem proper; that in consideration thereof the said Gregory agreed to pay certain sums of money to said managers and to execute bond as required by said act, which said sum was paid and said bond was duly executed, received by said managers, and approved by the county court of Henry county.

The defendant Douglas states that he has acquired the right to operate and conduct the said lottery scheme by drawing said classes and to the net earnings thereof under and by virtue of a contract made upon a valuable consideration with said Gregory and his assignees on the 3rd of September, 1874; that the said contract, among other things, provides and stipulates as follows: And the further
sum of $1,000 on the day when the last remaining one of the
63 classes before mentioned shall be drawn, making in all, inclusive of said last-mentioned sum, an aggregate sum of $26,500; that under said scheme comprising said classes the number 12112 has not been drawn, as provided and stipulated in said contract; that said contract was assigned to Simmons & Co. and thereafter duly assigned to this defendant, Douglas, for a valuable consideration, and that he has expended large sums of money and incurred liability for large sums of money in carrying out said contract; that afterwards, on the 11th day of September, 1878, in the case of J. N. Webb, appellant, *vs.* The Commonwealth of Kentucky, appellee, the court of appeals of Kentucky decided in an action brought by the Commonwealth of Kentucky, by her attorney general, filed originally in the Franklin circuit court, in the nature of a writ of *quo warranto*, *vs.* S. T. Dickinson and others, as vendees of the said managers, to enjoin them from using said grant, that under the act of 1850 the right to operate said lottery was legally granted; that the sale to Gregory and Gregory's assignees was valid, and that section 6 of article 21, chapter 28, of the Revised Statutes, by which it was provided that three years after the adoption of the said chapter all rights and privileges which may have been granted by the legislature of Kentucky to raise money by lottery for any purpose shall cease and determine, was void and of no effect as to the said Gregory, his assignees and vendees; that the said Gregory acquired by said contract a vested right which could not be repealed by subsequent legislatures; that afterwards the said

J. J. Douglas, as assignee and vendee under said contract,
64 in pursuance of the act of the General Assembly of the Commonwealth of Kentucky of December 9, 1850, operating a lottery under a scheme devised by the managers in said act, and by them sold, transferred, and conveyed as aforesaid, was indicted in the Jefferson circuit court for operating a lottery in violation of the laws of the State of Kentucky; that upon the trial of said indictment the said J. J. Douglas was acquitted upon the ground that he had the legal right to operate, manage, and conduct the said lottery notwithstanding the statute of 1850, section 6, article 21, chapter 28, of the Revised Statutes, which provided as aforesaid that three years after the adoption of the said Revised Statutes all rights and privileges which may have been granted by the legislature to raise money by lottery for any purpose should cease and determine, and this judgment of the Jefferson circuit court dismissing said indictment against the said Douglas was, upon an appeal duly taken therefrom to the court of appeals of Kentucky on the 25th day of November, 1882, affirmed, the said appellate court adjudging as follows:

"The opinion of this court in the case of J. N. Webb, &c., *vs.* The Commonwealth, delivered September 11, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and establishes the following propositions of law applicable to lottery grants approved December 9, 1850, authorizing the raising of $50,000 for the benefit of the
65 Henry Academy and Henry Female College:

"First. That the grant was not repealed by the Revised Statutes which went into effect July 1, 1852.

"Second. That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of $50,000.

"Third. That there has been no use made of the franchise up to the 14th day of February, 1877, the time at which the pleadings were completed in the Webb case, and therefore no question of exhaustion prior to that time could arise. The instructions of the court below and the rulings of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

The defendant Douglas in this action pleads and relies upon the said judgment of the Jefferson circuit court and of the court of appeals as *res adjudicata* in bar of this proceeding, and claims that by virtue of the said decisions by the Jefferson circuit court and the court of appeals in said case his right to operate the said Henry Academy and Female College lottery is legal, existing, and unimpeachable, and that the said act of the legislature referred to in the petition approved March 22, 1890, and section 226 of the present constitution are void in so far as they affect his right to operate said Henry Academy and Female College lottery.

To this answer of Douglas the Commonwealth has de-
66 murred. It will be seen that the defendant in the case of the Henry Academy and Female College lottery presents two defenses: First, the plea of *res adjudicata* by virtue of the judgments of the Jefferson circuit court and of the court of appeals in the indictment and judgments pleaded in bar, and, second, the unconstitutionality of the act of 1890 and of section 226 of the present constitution in so far as they attempt to divest or interfere with his right to operate the said Gregory franchise. So far as the plea of *res adjudicata* is concerned, I agree with the learned attorney general that while a judgment of ouster is a complete bar until reversed or vacated a judgment for a defendant in a *quo warranto* proceeding is not a bar to a subsequent *quo warranto* proceeding against him for usurpation of the same franchise for other or supervenient grounds. In such a proceeding a judgment for the defendant may be proper in a former action for many reasons which may not exist in a subsequent proceeding against the same defendant upon the same franchise. The grant itself may not have terminated or expired in the first proceeding and the defendant in that proceeding may not have been guilty of any acts which in a subsequent proceeding could be successfully charged against him as a ground of forfeiture of the franchise or vacation of the charter.

The analogy between a *quo warranto* and an action in ejectment as contended for by the learned attorney general, I think, is complete.

See—

67 Speed *vs.* Braxtell, 7 Mon., 575.
McClain *vs.* French, 3 Mon., 386.
Eastin *vs.* Rucker, 1 J. J. Marshall, 234.
People *vs.* Scott, 19 Johnson N. Y.
Utica Insurance Company *vs.* Scott, 8 Cowan.
People *vs.* Richardson, 4 Cowan.

While the opinion of the court of appeals pleaded and relied on by the defendant may be useful as illustrative of the character and validity of the rights of parties under a contract, it is wholly unavailing as a plea of *res adjudicata* to a subsequent *quo warranto* proceeding against the same defendant.

See Troutman *vs.* Vernon, 1 Bush., 482.

It follows, therefore, that with reference to this Henry county grant the plea of *res adjudicata* is not well taken and the demurrer thereto must be sustained.

The defendant further pleads in bar of the proceedings to vacate the Henry county grant the contract entered into with Walter Gregory on September 3, 1874, in which, as successors to the Henry county grant, it appears that he was bound on the 19th day of June, 1889, as Gregory had been, to pay in lawful money of the United States, among other payments, the following: On the 19th of June, 1889, and on the 19th day of December, 1889, and on the 19th day of June, 1890, and on the 19th day of December, 1890, and on the

19th day of June, 1891, respectively, the sum of $750, and the further sum of $1,000 on the day when the last remaining
68 one of the classes shall be drawn, making in all, inclusive of said last-mentioned sum, an aggregate of $26,500.

By reference to the "Exhibit A," referred to in the defendant's answer, and which is made part thereof, the date of the last drawing and of the last class to be drawn under said scheme was on the 19th day of June, 1891, on which last day the sum of $750.00 was to be paid, and also the further sum of $1,000.00, making in all, inclusive of said last-mentioned sum, the aggregate of $26,500.00. The defendant alleges that he has the right to continue to operate said lottery privilege or franchise, because he says all of said classes up to and including the last class, No. 12112, and which, when drawn together with the $1,000.00 required by said contract, would make the aggregate sum of $26,500.00, have not been drawn, and that he has the right to operate the said lottery until the said last class of 12112, with the payments due thereon, which would make the sum of $26,500.00 under the said Gregory contract, shall have been drawn and realized; but by reference to the Walter Gregory and Simmons contract contained in "Exhibit A" and referred to in his said answer, under which the defendant operates the said lottery franchise, it will be seen that this right to operate said franchise terminated and expired on the 19th day of June, 1891, when the last payment of $750.00 and the $1,000.00 in addition should have been paid. He cannot extend the limitation upon the operation of the said franchise beyond the boundary fixed to it under the Simmons and Gregory contract, through and under which he
69 claims the right to operate the same, because of his not having drawn the full complement of classes and his consequent failure to realize and pay over the full amount of $50,000.00 as required by the said Gregory contract, and so it follows that his right to operate the same has terminated and no longer exists by reason of the expiration of the limitation under the Gregory and Simmons contract for operating the same.

For this reason the demurrer to the answer of J. J. Douglas in the case of the Henry Academy and Female College lottery grant must be sustained; and, as it is impossible for him to amend by reason of the expiration of the grant or franchise, a judgment of ouster must be awarded the Commonwealth in accordance with the prayer of its petition, enjoining and prohibiting him from further operating said grant or franchise, and that the same be adjudged to have terminated and expired and no longer to exist, and also for a judgment for costs in this action.

We come now to consider the demurrer of the Commonwealth to the answer of J. J. Douglas in the action against him for operating what is known as the Frankfort lottery grant. The Commonwealth, in this suit, as in the Henry Academy grant, predicates its demand for judgment against him herein upon section 226 of the present constitution above quoted, and also upon the act of the 22nd of March, 1890, entitled An act to repeal so much of section 18 of the act entitled An act to amend and reduce into one the several

70 acts in relation to the city of Frankfort, approved March 16, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as had been granted to the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, approved February 1, 1838, and to repeal the amendatory acts in relation to said grants.

The defendant in his answer in this action presents three pleas or defenses to the petition of the Commonwealth. In his first he formally denies that he is unlawfully exercising the franchise or privilege in controversy; secondly, he pleads the various acts of the legislature, commencing with the act approved February 1, 1838, creating the Frankfort lottery "for the benefit of the city schools of the town of Frankfort, and for the construction of such reservoirs, pipes, and other works as might be necessary to convey water from Cove spring to the town of Frankfort," down to and including the act approved March 16, 1869, entitled An act to amend and reduce into one the several acts in relation to the city of Frankfort, which conferred upon the board of councilmen of the city of Frankfort all the powers and privileges, franchise, and authority to operate a lottery which had been conferred on the managers in the original act of February 1, 1838, and also the act of March 28, 1872, authorizing and empowering the board of councilmen of the said city of Frankfort to bargain, sell, and convey, rent, or lease the said lottery franchise conferred upon the said city by the act of March 16, 1869, and also the contract entered into by and between E. S.

71 Stewart and the mayor and board of councilmen of the city of Frankfort on the 31st day of December, 1875, wherein the said city of Frankfort and the mayor and board of councilmen, under and by virtue of the authority conferred upon them by the act of March 28, 1872, for a valuable consideration sold, conveyed, and assigned to said E. S. Stewart the said lottery franchise conferred upon the said city by the act of March 16, 1869. He alleges the death of E. S. Stewart, and that Annie B. Stewart, wife of the said E. S. Stewart, was the sole legatee and devisee under the will of the said E. S. Stewart, which was duly probated, and that under said will the said Annie B. Stewart was the sole owner of said franchise scheme and contract purchased by E. S. Stewart, her husband, from the city of Frankfort, as aforesaid, under his said contract of December 31, 1875, and that he, the said J. J. Douglas, the defendant in this action, by a contract in writing entered into with the said Annie B. Stewart, for a valuable consideration, acquired and has the right to operate the said franchise in accordance with the terms of said contract. He avers that all of these said acts of the legislature and the contract of purchase from the city of Frankfort by E. S. Stewart and his, the said Douglas', contract with Annie B. Stewart, sole legatee of E. S. Stewart, were passed, entered into, and performed prior to the passage of the act of the General Assembly of the 22nd of March, 1890, relied on by the Commonwealth, and prior to the adoption of the constitutional provision (section 226) cited, referred to, and relied

72 on in the petition of the Commonwealth, and he says that

by virtue of the said prior acts of the legislature and of said contracts he became invested with the right to conduct, manage, and operate the said franchise and to own and have the net earnings resulting from the operation thereof prior to the passage of the said acts of the General Assembly and prior to the adoption of the said constitutional provision, section 226 of the present constitution, relied on by the Commonwealth in this proceeding; that, having and owning a property right under said contracts to operate the said privilege or lottery grant, it is incompetent for the State of Kentucky to impair or destroy the obligations of his said contract and his property rights growing out of the same either by her legislature or by her constitutional convention.

In his third paragraph he pleads and relies upon the decision of the court of appeals of Kentucky, rendered on the 27th day of February, 1878, affirming the judgment of the Oldham circuit court in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort as *res adjudicata* and a plea in bar of this proceeding.

As we have seen in a former part of this opinion, when considering the defendant's claim under the Henry Academy and Female College grant, the plea of *res adjudicata* in a proceeding against a party charged with the usurpation of a franchise is not a bar to a subsequent *quo warranto* proceeding under the code against him, however useful and authoritative such decisions may be in determining the validity of the original grant and of the contract
73 rights therein subsequently acquired by intervening third parties, purchasers for value. It is ingenuously and ably argued by both of the learned and distinguished counsel for the Commonwealth that the answer is insufficient in this action because it had not sufficiently averred a compliance on the part of the defendant and of those under whom he claims with the covenants devolved upon them by virtue of the contract of the 31st of December, 1875, between E. S. Stewart and the city of Frankfort; that, outside and independent of the constitutional question raised by the defendant, his answer was bad for want of sufficient averments of fact showing that at the time of the filing of the *quo warranto* proceedings against him he was entitled to operate the said franchise, the learned counsel insisting that the defendant in this action must evince by specific averment his title to the disputed franchise, just as in an action of ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his a-versary.

By an examination of the answer it will appear that the defendant, although upon rules of pleading applicable to actions such as this, is not required to do so, yet has averred with particularity on his part and on the part of those through whome he claims a compliance with all the covenants and obligations imposed upon them by the said contract of purchase between E. S. Stewart and the city of Frankfort of December 31st, 1875. Upon this point it is sufficient to say, the constitutional question being laid aside for the present, that if the validity of the acts of the legislature creating and conferring the said lottery grant in the first

stance and the validity of the contract of purchase by E. S. ewart of said franchise or grant from the city of Frankfort be nceded, the Commonwealth in this action, under the sections of e code above cited, must, as in any other civil action, in order to mand judgment against the defendant in the *prima facie* rightful ssession of such grant or franchise, allege and prove facts incon- tent with such *prima facie* show of title on his part. This pro- eding is not in the nature of a bill of discovery against the de- ndants and cannot be used for such purposes. The defendant uglas has specially pleaded the various acts of the legislature eating the said franchise and conferring it upon the city of Frank- t, and the act of March 28th, 1872, authorizing the city of Frank- t to sell and convey it, and of the purchase by E. S. Stewart of d franchise from the city of Frankfort, and of his, the defendant's, uisition of title by contract to whatever rights or privileges the d E. S. Stewart derived under said contract with the city of nkfort; all of which he avers occurred prior to the adoption of present constitution of Kentucky and of the acts of the General sembly upon which these proceedings are founded.

The Commonwealth by its demurrer acknowledges the truth of ry statement of fact averred in the answer, and thus raises the stion whether the rights of the defendant are protected under either the State constitution or the Constitution of the United States, or both. Section 20 of article 13 (bill of rights) of the State constitution of 1850 provides "that no *ex post facto* nor any law impairing contracts shall be made." Section 19 of bill of rights of the present constitution, setting forth the great essential principals of liberty and free government, provides at no *ex post facto* law nor any law impairing the obligation of tracts shall be enacted." By article 1, section 10, clause 1, of Constitution of the United States, it is provided "that no State ll * * * pass any bill of attainder, *ex post facto* law, or any impairing the obligations of contracts." * * *

o avoid confusion of thought it is well to understand as we go ng what propositions of law are and what propositions of law are disputed, as well as to understand the character of the question ch this court is called upon to decide in this case. With the imental and ethical aspect of this case the court has nothing to I decline to discuss or pass upon it. This phase of the case perly belongs to the jurisdiction of moralists, orators, rhetori- s, the stump, the pulpit, and the press, whose province is to ulate and enforce public sentiment. The duty of the judiciary ot to make the law, but to expound it, and when, through the ious and mighty agency of these potent formulators of public iment, a storm of public prejudice is raised against any sys- or policy which may have once received public favor and tion, the legal rights of the citizen when threatened with destruction like the divine will revealed to the prophet Elijah on the mountain side is not to be discovered in the raging tempest, the earthquake, or the fire of public ut only in the still, small voice of the constitution, addressed to

the conscience of an impartial and independent judiciary. I approach the consideration of the constitutional question presented in this record with the most cautious circumspection and not without a full sense of the responsibility which its decision imposes. I shall consider the acts of the legislature and the contracts pleaded by the defendant as creating a constitutional bar to this action. The act of February 1st, 1838, entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, granted to certain persons named in said act the right to raise by way of lottery in one or more classes, as to them might seem expedient, a sum not to exceed a hundred thousand dollars, to be appropriated, one-half for the use and benefit of the city schools in the town of Frankfort and the other half for the construction of such reservoirs, pipes, and other works that might be necessary to convey water from Cove spring to the town of Frankfort. By section 4 of said act it was provided that the managers of said lottery created by said act "shall be, and they are hereby, authorized to sell and dispose of the scheme of any class or classes of said lottery to any person or persons who shall enter into bond to the Commonwealth of Kentucky, with
77 good security, with condition well and faithfully to comply with all the terms and provisions of this act, which bond or bonds shall be received by the said managers and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn." In the year following, by an act approved February 16th, 1839, entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," it was provided by section 26 thereof as follows: "The fourth section of an act entitled An act for the benefit of the city schools for the town of Frankfort, and for other purposes, approved February 1st, 1838, is hereby repealed, and it is hereby further enacted that the managers referred to in said act, or their successors, shall be, and are hereby, authorized to sell and dispose of the scheme of any class or classes of the lottery referred to in the said act to any person or persons who shall enter into bond, with good security, to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn, and if said bond and security is approved and declared to be sufficient by said county court and also by the board of trustees of the town of Frankfort, then in such case the managers shall not be individually responsible for any prize or prizes that may be drawn." By an act approved May 21st, 1861, entitled "An
78 act in relation to the town of Frankfort," it was provided as follows: "That so much of the 26th clause of an act entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as has been repealed by a subsequent act or acts of the General Assembly of this Commonwealth shall be, and the same is hereby, re-enacted, and all subsequent acts repealing the same are

hereby repealed." By an act approved March 16th, 1869, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," it was provided that "the city of Frankfort and its affairs shall be conducted by a board of councilmen, to be selected and qualified under the provisions of said act," and by section 18 of said act it was provided "that the said board of councilmen shall exercise and possess all the powers and privileges which by the general laws of the land in relation to towns and cities are granted to said trustees and councilmen. Said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city schools of Frankfort and for other purposes,' approved February 1st, 1838, and shall invest all the money realized thereunder in safe and solvent securities, and may use and appropriate the interest and profits of such investments for the support of the said schools."

By an act approved March 28th, 1872, entitled "An act amendatory to the laws of the city of Frankfort," it was provided as follows:

"That the board of councilmen of the city of Frankfort be,
79 and they are hereby, authorized and empowered to grant, bargain, sell, and convey, to rent and lease, any and all property or any part thereof belonging to the city of Frankfort, be the same lands, tenements, goods, chattels, or merchandise or immunities, on such terms and for such sums and at such times as said board of councilmen shall deem for the best interests of the city of Frankfort."

These are the acts of the legislature referred to and relied on by the defendant in his answer.

Looking to the preamble of the act of February 1st, 1838, which first created the franchise or immunity privilege of operating a lottery and conferred the right upon the municipality of the city of Frankfort to operate it, for the purpose of raising the sum of $100,000.00, it will be seen that the bestowal upon the said city of Frankfort in the first instance of the lottery franchise was by no means a mere voluntary gratuity or license upon the part of the State, but was a grant sustained by a highly meritorious and valuable consideration. The State of Kentucky had diverted, appropriated, and used the entire school fund of the city of Frankfort, and for the purpose of reimbursing the city of Frankfort for the said school fund thus appropriated by it the Commonwealth created and bestowed upon the said city of Frankfort the right to operate a lottery franchise for the purpose of raising $100,000.00. It is perfectly legitimate to look to the recitals in the preamble of an act to ascertain its intrinsic character and purpose. Indeed, Lord Coke is authority for the statement that "the preamble is the key with

which to unlock the meaning of the statute."

80 These were the statutes of the State with reference to the Frankfort lottery grant when the parties, the City of Frankfort and E. S. Stewart, came to make their contract on December 31st, 1875. The act of March 16, 1869, had conferred upon the board of councilmen of the city of Frankfort all the powers and

privileges, franchises, and authority to operate a lottery which had been conferred on the managers in the original act of February 1st, 1838, and the act of March 28th, 1872, had expressly authorized and empowered the said board of councilmen to bargain, sell, and convey the said lottery franchise which had been conferred upon the said city by the act of March 16, 1869. All contracts are to be expounded and their construction, interpretation, and validity tested and determined by the law of the place where and when they are made. Matters connected with their performance are regulated by the law of the place of performance and *lex loci contractus*, while the remedial matters depend on the law of the place where the remedy is invoked, the *lex fori*. Scudder *vs.* The Union National Bank, 1 Otto, 413. The Frankfort lottery privilege was created and conferred upon the city of Frankfort by the law-making power of the Commonwealth; its legislative promulgation was authorized and sanctioned by the organic fundamental law of the Commonwealth then in force. The lottery franchise or privilege at the time E. S. Stewart purchased it from the city of Frankfort, on the 31st day of December, 1875, was lawful, because
81 it had been created by an express statute and conferred upon the city. Its end, object, and purpose, as we have seen, were lawful. The legislature, to accomplish the purposes and design of its original creation, authorized the city of Frankfort to sell the said franchise to any purchaser who would pay for it. Relying upon the legal validity of said privilege which had been conferred by the State government upon the city of Frankfort, and relying further upon the authority expressly conferred by the law-making power of the State upon the city of Frankfort to sell and dispose of the same, E. S. Stewart entered into a contract or purchase of said privilege for a valuable, legal consideration. Surely there was nothing immoral in this transaction, unless crime be imputed to the State. The binding obligation of this contract of purchase by Stewart from the city of Frankfort is derived from a source above the vendor. It rests upon the power conferred by the State sovereignty upon the city of Frankfort to make it, the same power that created the franchise and conferred it upon the city of Frankfort in the first instance. While all must concede and none will dispute the legal proposition that a legislative grant in Kentucky is always revocable in the hands of the grantee under the act of 1856, and that as to a mere license or lottery privilege the grantee holds it only *durante bene placito*, and, further, while it is admitted that the lottery privilege is strictly within the police power of a State, and as such is subject to the ultimate legislative will of the Commonwealth to continue or destroy it, the question presented here by the demurrer of the Commonwealth is beyond and outside of
82 these postulates of law. While the lottery privilege under the act of February 1, 1838, bestowing it in the first instance upon the city of Frankfort, and under the act of March 16, 1869, bestowing the original franchise upon the board of councilmen of said city, was in the hands of the first donees or grantees of said privilege revocable, and could only be revoked by the State and

could only be exercised by the said grantee, the city of Frankfort, *durante bene placito*, the defendant insists that when the Commonwealth, through its law-making power, by an act approved March 28, 1872, authorized the board of councilmen of the city of Frankfort to sell the said franchise, and when E. S. Stewart, acting upon the faith of said act, purchased the said privilege from the city of Frankfort, the Commonwealth, thereby having placed the subject-matter within the domain and under the control of the contract obligations between the said city of Frankfort and the purchaser, constitutionally disabled herself from subsequently impairing said contract by subsequent hostile legislation against the subject-matter thereof. This is the contention of the defendant in this action. What was the character of the property acquired by E. S. Stewart under the contract of purchase which he entered into with the city of Frankfort on December 31, 1875? The court of appeals of Kentucky has answered this question. In Gregory's Executrix *vs.* The Trustees of Shelby College, 2 Metcalfe, 589, the facts are these: A lottery franchise has been conferred by the legislature of Kentucky in February, 1836, upon the trustees of Shelby College. At the
83 next ensuing session of the legislature an act was passed which, by section 3 thereof, empowered the managers to sell and dispose of the scheme or any class or classes of said lottery to any person or persons who should enter into bond with good security, conditioned well and faithfully to comply with all the terms and conditions of the said act, payable to the Commonwealth of Kentucky, and with other provisos and limitations upon the power of sale thus conferred. Afterwards John Lane, one of the managers, and others having died or resigned, undertook to sell the lottery franchise to one Walter Gregory. After the death of all the persons who were named as managers, one William I. Waller, a clergyman, who was interested in the advancement of the college, had on the faith of the lottery grant advanced large sums of money which had been appropriated to the benefit of the said Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. After Waller had loaned his money and taken a mortgage upon the lottery grant, an act was passed by the legislature on July 1, 1852, to take effect three years from that date, to wit, on July 1, 1855, which said act is found in the Revised Statutes, page 271, repealing the Shelby county lottery grant and all other lottery privileges theretofore granted for the purpose of raising money by lottery or for any other purpose. The court of appeals, in determining whether or not under his contract of indemnity Waller had the right
84 to continue to have the lottery operated for his benefit after the statute repealing it had been enacted, said: "The grant of a privilege to raise money by a lottery is a mere gratuity; it is not an act of incorporation; it confers no chartered right, nor does it amount to a contract. The power of the legislature to repeal the grant and thereby to withdraw the privilege where no rights have been acquired under the act by which it was created nor any liability incurred in consequence of its passage is therefore clear and

unquestionable. It was said by this court in the case of the Covington and Lexington Railroad Company *vs.* Kenton County Court, 12 Ben. Monroe, 147, that it cannot be denied a legislature possesses the power and the right to take away by statute what has been given by statute unless rights have vested under the law before its repeal. If the legislature delegate an authority, it can certainly be revoked before the power has been exercised in such a manner as to create a vested right. A repeal of a statute necessarily terminates all proceedings under that statute unless rights have accrued under it which cannot be legally divested. It was therefore held in that case that the legislature had the power to repeal an act amending the charter of the railroad company by which a mere privilege only was conferred, and that the repealing act having been passed before any rights had been acquired under the amendment, it was not unconstitutional. Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have
85 accrued under it, and though lotteries have a demoralizing tendency and *the* exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason have been almost universally denounced by the law-making power of the different States of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, that law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases:

"Dartmouth College *vs.* Woodward, 4 Wheaton, 518–643.

"Fletcher *vs.* Peck, 9 Cranch, 88.

"University of Maryland *vs.* Williams, 9 Gil. & Johnson, 365.

"Terret *vs.* Taylor, 9 Cranch, 52.

"City of Louisville *vs.* University of Louisville, 15 Ben. Monroe, 642–692.

"The plaintiff Waller, before the repealing act was passed, had on the faith of the lottery grant advanced large sums of money which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College and the
86 money was advanced by Waller, with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he, Waller, became thereby invested with a right to use the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right, of which he could not be divested by an act of the legislature. So far, therefore, as the repealing statute interferes with or affects this right it is unconstitutional and inoperative; but as the lottery privilege is only saved from the operation of the repealing act by the existence of this right and to the extent thereof,

it follows as a necessary consequence that the grant has been repealed, except so far as it may be needed for the purpose of raising the sums of money which Waller had advanced for the benefit of the college before the passage of the act. Whenever that object shall have been accomplished the right to use the privilege will then have ceased and determined. As, therefore, the lottery grant was not entirely repealed by the provision of the Revised Statutes, but the privileg- might still have been used for the purpose of raising the amount due to Waller, the appellant for the reasons before mentioned was not entitled to any further relief than that which she obtained by the judgment of the court below.

"Wherefore said judgment is affirmed."

In the case of J. N. Webb *vs.* The Commonwealth, which was an action instituted by the attorney general on behalf of the State, in the Franklin circuit court, and afterwards transferred to the
87 Oldham circuit court, in the nature of a *quo warranto* against S. T. Dickinson and others, as vendees of said managers, the court of appeals adjudged, in reference to the Henry Academy and Female College grant, that under the act of 1850 the right to operate said lottery was legally granted; that the sale to Gregory and Gregory's assignees by the managers was legal and valid, and that section 6 of article 21 of chapter 28 of the Revised Statutes, by which it was provided "That all rights and privileges which had been granted by the legislature of Kentucky to raise money by lottery for any purpose should cease and determine," was void and of no effect as to the said purchase of Gregory and his assignees and vendees; that the said Gregory, having purchased the said privilege from the said managers, acquired by said contract a vested right which could not be repealed by subsequent legislation. In the case of the Commonwealth *vs.* Douglas the defendant in this action, indicted in the Jefferson circuit court for operating the lottery franchise in question, on appeal by the Commonwealth from the judgment of the Jefferson circuit court dismissing said indictment, the court of appeals on the 25th day of November, 1882, in the opinion of the court affirming the judgment of the court below, use- the following language: "The opinion of this court in the case of J. N. Webb *vs.* The Commonwealth, delivered September 11th, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and establishes the following propositions as the law applicable to the lottery
88 grant, approved December 9th, 1850, authorizing the raising of $50,000.00 for the benefit of the Henry Academy and Henry Female College:

"1. That the grant was not repealed by the Revised Statutes which went into effect July 1st, 1852.

"2. That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of $50,000.00.

"3. That there has been no use made of the franchise up to the 14th of February, 1877, the time at which the pleadings were com-

pleted in the Webb case, and therefore no question of exhaustion prior to that time could arise.

"The instructions of the court below and the rulings of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

In the case of The Commonwealth *vs.* The City of Frankfort, decided January 27th, 1878, by the court of appeals of Kentucky, it was held that under the act of 1869 a lottery franchise was created and conferred upon the board of councilmen of the city of Frankfort for the purposes enumerated in this action. It was further held that under the act of 1872 the city of Frankfort was authorized to sell and convey the lottery franchise, and that by the contract of December 31st, 1875, between the board of councilmen and the mayor of the city of Frankfort on the one part and E. S.
89 Stewart on the other part the franchise was sold and conveyed according to the terms and provisions of that contract, and that the contract was in accordance with the provisions of the enabling act which conferred the power upon the city of Frankfort to sell the franchise, and affirmed the judgment of the court below. In the opinion of the court, rendered by Judge Elliott, in sustaining the constitutionality of the act of 1869, conferring upon the board of councilmen of the city of Frankfort the said lottery franchise, — said: "Certainly the education of the youth of Frankfort related not only to the city but to its future prosperity and welfare, and we are of opinion that the provisions of the 18th section of the act of 1869 were fully covered by its title when construed in the light of the decision of this and other courts of the Union. * * * If the lottery franchise is immoral in its tendency the legislature must interfere. This court can construe and decide what the law is, but it has no power either to make a law or to repeal one already made by judicial construction."

Under his contract of purchase of the 31st of December, 1875, of the said franchise from the city of Frankfort, E. S. Stewart through whom the defendant claims, in compliance with the requirements of the said contract of purchase, executed his bond to the Commonwealth of Kentucky, with four approved sureties, in the penal sum of $100,000.00 in accordance with the requirements of the act of March 28th, 1872, authorizing said sale. The bond covenanted that in consideration of the contract and the provisions of the
90 acts of the General Assembly referred to the said Stewart and his sureties bound themselves to faithfully comply with the provisions of the said act, and also to pay the sums stipulated in the said contract to be paid to the city of Frankfort and for the payment of all prizes that might be drawn in any class under said scheme, and the said bond was to be void upon the full compliance on the part of the said Stewart with all the conditions of said contract. It is unnecessary to reproduce here the proceedings of the general council of the city of Frankfort relative to the said contract. Suffice it to say they were in every respect regular and in conformity with the requirements of the act of 1872 authorizing the

said sale. The bond executed by Stewart was received by the city of Frankfort as sufficient and was filed in the Franklin county court in accordance with the provisions of the act, thus making the contract between the city of Frankfort and the said E. S. Stewart an executed contract. The title and the franchise thereunder passed and vested in the said Stewart by virtue of said contract. It is superfluous and nugatory to argue that the creation of the lottery franchise by the law-making power of this Commonwealth and its subsequent purchase by E. S. Stewart from the original grantee was immoral, illegal, or contrary to the public policy of the State, for, as we have seen, it has received the sanction of the highest judicial authority of the Commonwealth. The title of the defendant Douglas, derived through E. S. Stewart, to the lottery privilege is
91 an intervening vested right of property arising out of a contract of purchase expressly authorized by the State, for which he has paid the city of Frankfort and the city of Frankfort has received a valuable consideration, not only in money paid, but in the risks and obligations and liabilities incurred by the defendant under the said contract of purchase. The obligatory force of the contract of purchase under which the defendant claims to operate the franchise he purchased from the city of Frankfort is derived not only from the contract itself, but from the statute of the Commonwealth authorizing the sale of said franchise or privilege. The court of appeals of Kentucky has said that the responsibility belongs to the State that created and granted the lottery franchise in the first instance and afterwards by express statute authorized a contract of sale of the same, out of which has arisen vested contract rights of property in the defendant Douglas; that general notions of the policy or impolicy of the original grant as made and of the contract as afterwards authorized and executed come too late when vested rights of property resting upon the obligatory force of said contract have been created. The question is, Has the law-making power of the State constitutional authority, competency, or jurisdiction vested in the legislature or in the constitutional convention to impair the obligation of said contract and thereby destroy the vested rights of property in the said purchaser resting thereon? The question is, Has the State of Kentucky, through her legislature or by her constitutional convention, the constitutional power to annul a contract between the city
92 of Frankfort and E. S. Stewart and divest him and his assignees of his property rights under his said contract without their default and against their will and without making them compensation therefor? The defendant insists that this cannot be done, and that to allow such would be a flagrant violation of the principles of justice and of the Federal Constitution which secures to every citizen the full enjoyment of his contract rights against encroachment or invasion by the States. The fact is the legislature of Kentucky made this lottery privilege the legitimate subject of contract, valuable and vendable in law, by authorizing its grantee, the city of Frankfort, to sell the same. It invested the said lottery privilege with the attributes and essential incidents and character of a legal

estate by making it vendable in the hands of its grantee and making it subject to State and municipal taxation. It thus converted a revocable grant in the hands of its grantee, the city of Frankfort, into a valuable legal estate irrevocable in the hands of a purchaser for value under the contract authorized by the State, and thereby the said contract and the rights of property, resting upon the legal force of its obligations, were placed under the shielding protection of the Constitution of the United States, as much so as any other species of property or contract was ever placed against impairment or invasion by State authority. The authority conferred by the State upon Frankfort to sell the franchise or privilege implied an obligation on its part not to take away or destroy the thing sold.

93 It must be presumed that the State understood the legal effect of the contract of sale which it authorized the city of Frankfort to make, which was to vest in the purchaser the legal title to the subject-matter of the sale, a title resting in contract and growing out of and depending upon the validity and inviolability of its contractual obligations.

The integrity and perpetuation of human society rest upon the inviolability of contracts. All the obligations of social and civil life, all rights, duties, and obligations, individual, State, and national, rest upon the sanctity of contracts and depend upon their sacred observance and fulfillment. It has been well said that the degree which a State marks in the scale of civilization may be accurately measured by the strictness with which its laws construe, interpret, and enforce contracts. Said Mr. Justice Swayne in Farrington *vs.* Tennessee, 5 Otto, 682, in delivering the opinion of the Supreme Court of the United States: "Compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They *guage* the confidence of man in the truthfulness and integrity of his fellow-man. They are the springs of business, truth, and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting

94 in a body politic the progress of descent has begun and a lower plane will be speedily reached. To the extent to which the defect exists among individuals there is decay and degeneracy. As are the integral parts so is the aggregated mass. Under a monarchy or an aristocracy order may be upheld and rights enforced by the strong arm of power, but a republican government can have no foundation other than the virtue of its citizens. When that is impaired all is in peril. It is needless to lift the vail and contemplate the future of such a people. Trist *vs.* Child, 21 Wall., 441; Montesquieu's Spirit of Laws, 25. History but repeats itself. The trite old aphorism that 'honesty is the best policy' is true alike of individuals and communities. It is vital to the highest welfare."

If one citizen violates his contract with another or destroys the property of another, the law furnishes a remedy in the courts of the

State. If one nation violates its contract with another nation or commits a wrong, whether by contract or trespass upon the rights of its foreign subject or citizen, the government, the property rights of whose citizen are thus violated, upon well-recognized principles of international law may have recourse to measures of retaliation, reprisal, or to open war for redress. Phillimore International Law, page 29. If one nation takes possession of what belongs to another or if she refuses to pay a debt or to repair an injury or to give adequate satisfaction for such injury to the property rights of another nation or to the property rights of the subjects of
95 another nation, the latter may seize something belonging to the former and apply it to her own advantage until she obtains payment for what is due her or to her citizens, together with interest and damages, or keep it as a pledge until she has received ample satisfaction. Vatt-l's Law of Nations, page 283. As between nations the property of the individuals is considered as the property of the nation, and accordingly in every civilized State a subject or citizen injured by a foreign nation in his property rights has recourse to his sovereign, who will demand justice from the offending nation or make reprisals, for every nation is bound to protect its own citizens whose case is its case. Vatt-l's Law of Nations, 285. This principle of international law was recognized in 1855 by the United States Government in the instructions which Mr. Marcy, Secretary of State, gave to Mr. Clay, minister of the United States at Lima, and by President Jackson in his message to Congress in December, 1834, in which he stated it was a well-settled principle of international law that where one nation is under a contractual obligation to another which it refuses to recognize the aggrieved State may seize on property belonging to the other, its citizens or subjects, sufficient to pay the debt without giving just cause of war. This principle of international justice was recognized by the mixed commission organized under the convention of the United States with England in 1853 in the case of a British subject who had received before the annexation of Texas bonds secured by the pledge of the faith and revenue of that State.
96 It was held that the United States was bound to see that the obligations of Texas to British subjects were fulfilled. In 1847 a motion was carried through the House of Commons for the issuance of letters — mark and reprisal against Spain because of her repudiation of Spanish bonds owned by British subjects. In the matter of the Silician loan, in the argument of the English civilians against the reprisals made by the King of Prussia on account of the capture of German vessels by the cruisers of Great Britain, it was stated that "it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt from himself to a private man. There is a confidence that it will not be done. A private man lends money to a prince upon an engagement of honor, because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England and France adhere to this public faith that even during the war terminated by the peace of Aix-la-Chapelle they suffered no inquiry to be made

whether any part of the public debt was due to the subjects of the enemy, though it is certain that many Englishmen had money in French funds and many Frenchmen had money in English funds.

In speaking of the report of the English civilians Vattel demonstrates it "*un excellent morceau de droit des gens.*" Montesquieu calls it a wise reply, "*une response sans replique.*"

In the case of The United States *vs.* Dickelman, 2 Otto, 524,
97 Mr. Justice Waite, in delivering the opinion of the court, said: One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty except in performance of his obligations by treaty or otherwise, voluntarily so made. Hence citizens of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts as of right, but by diplomacy, or, if need be, by war.

We have cited these familiar principles of international law to show that as between nations violations of contract, like violations of treaties, are *casus belli*, and this not only with reference to international contracts, but with reference to the individual rights of property of the citizen or subject of one nation where they are violated, annulled, or destroyed by the acts of a foreign government.

As between the States of this Union their contractual obligations are vindicated, not by letters of mark and reprisals or declarations of war, but under the Constitution of the United States in the Supreme Court, which is a court of original jurisdiction for the enforcement of such contracts. As between the citizens of one State and the citizens of another State their contractual disputes may be de-
98 cided by the State or Federal judiciary, but as to disputes between a State and her own citizens or between citizens of the same State they are subject to the judicial arbitrament of the State laws, administered in the State courts, save and except where the State undertakes to commit a wrong upon her own citizens inhibited by the Constitution of the United States. To take property wrongfully and by force from a man is robbery; if committed by an individual, the wrong-doer is a felony and amenable to the penal laws of the State; when committed by one nation against another nation or the citizens of another sovereignty it is, as we have seen, a *casus belli*, but when a State sovereignty attempts to destroy the contract rights of property of its own citizens he can shield himself under the safeguards of the State or Federal Constitution which may be invoked in the tribunals of his own State and by appeal, if he desires, to the Federal judicial tribunals.

It is undoubtedly true, both under the State law and under the present constitution of Kentucky, that the Commonwealth could revoke the grant of the lottery privilege in the hands of its grantee,

the city of Frankfort, for, as between the State and the said city of Frankfort, the right to operate the lottery, although conferred by the Commonwealth upon a highly meritorious consideration and for a public use, was a mere revocable legislative indulgence and not a vested right of property; but if the State had entered into a contract with the city of Frankfort and had not made a merely gra-
99 tuitous grant—in other words, if the franchise had been sold by the State for a valuable consideration to the city of Frankfort as a purchaser—it may well be doubted whether the State could have afterwards destroyed the obligations of its contract by destroying the subject-matter which it had sold. In the case of a gratuity the licensee is a mere tenant at will or by sufferance, *durante bene placito*. In the hands of the grantee the privilege is not a property right, but a mere revocable indulgence, just as it is the tenure of a tenant at will or by sufferance. The landlord in such a case can at any time terminate such a tenancy, but if the owner of the fee expressly authorized his tenant at will or by sufferance to sell his right of occupancy for a definite period or for a particular purpose to a third party for a valuable consideration, will any lawyer say that the purchaser acquires no higher estate nor more valuable vested right of property than the tenant at will or by sufferance had? The landlord may enter at his pleasure against his tenant at will or by sufferance, but the right of sufferance merges into a legal right of property to the possession when the tenant by sufferance or at will, under direct authority from his landlord, sells the estate to a third part- for value for a particular time or for a particular purpose. The franchise or privilege conferred upon the board of councilmen of the city of Frankfort by the act of 1869, it is conceded, is not a grant within the meaning of that term as used in Fletcher *vs.* Peck. "A grant," said the Supreme Court of the United States
100 in that case, "is in its very nature an extinguishment of all the rights of the grantor, and implies an obligation not to reassert that right. It is not claimed by the learned counsel for the defendant that the right of the lottery privilege under the act of 1869 is such a one. The privilege in the first instance to the city of Frankfort was a revocable power, but when sold by the city under an express act and by the express authority of the State the power to operate the privilege in the hands of the purchaser for value is a power coupled with an interest, a legal estate in his hands, which cannot be revoked or confiscated by the State, although in the first instance the privilege was conferred, as we have seen, upon the city of Frankfort by the Commonwealth for the purpose of reimbursing that city for monies of which it had been despoiled by the State, and was created for declared objects of public utility. It is conceded that the privilege or grant was a mere revocable gratuity touching a matter over which the State possessed plenary jurisdiction under its recognized public powers; but it is an artful theory and one expressly repudiated by the court of appeals of this State in the decisions cited and in decisions which I shall cite further along that because the regulation of suppression of lotteries is within the undisputed police jurisdiction of the Common-

wealth, that therefore all contract vested rights of property that may intervene touching the same may be abrogated at the will of the sovereign. Where the State, after the establishment of
101 such a privilege, confers upon its grantee the power of converting the privilege or immunity into a legal estate by selling it for value to a third party, and then taxes it as property in his hands under State and municipal tax laws, the proposition that the State may divest the title and confiscate the property rights of the purchaser in the said privilege against his will and without making him compensation therefor is neither sound in morals, in logic, nor in constitutional law.

"No State," says the Constitution, "shall pass any law impairing the obligations of contracts." This inhibition and constitutional disqualification applies as well to the constitution of a State as to the acts of its legislature. Dodge *vs.* Woolsey, 18 Howard, 331. Indeed, it was not contended at bar and will not be contended by counsel that there is a whit more potency or validity in the ordinances of the constitution of a State, which in effect impairs the obligations of a contract, than there is in the like acts of its legislature. The Supreme Court of the United States in many cases has decided this express point until it is no longer a question. In Gum *vs.* Barry, 15 Wallace, page 610, Mr. Justice Swayne, delivering the opinion of the court, holding that the first section of the seventh article of the constitution of Georgia adopted in 1868 was unconstitutional and void, so far as it affected the contract rights of the appellant, John Mck. Gunn, after quoting section 10 of article 1 of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts," said: "The legal remedies for the enforcement of
102 a contract which existed at the time and place where it is made are a part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the provision of the Constitution or the legislative act of a State fall within the category last mentioned they are to that extent utterly void. They are for all the purposes of the contract which they impair as if they had never existed. The constitutional provision and the statute of the State of Georgia here in question are clearly within that category, and are therefore absolutely void," and reversed the judgment of the supreme court of the State of Georgia. See also White *vs.* Hart, 13 Wallace. Where there is an investiture of an estate dependent upon the growing out of the enforcement of the obligations of a contract to destroy the estate or property is not only to impair, but to annul the obligations of the contract. Such an estate or legal right of property resting in contract, being legal at the time of its creation, cannot be touched by hostile hands, however ill-advised may have been the law allowing its creation. The safeguards of the Federal Constitution are around it and above it to shield and protect it against encroachment and impairment by the State government. To annul a contract and snatch away the rights of property created thereby, without making compensation therefor, because the State which created the estate in the first

instance and authorized its sale by its guarantee has, since said contract was executed, changed its policy and views as to the morale of the business, would be a confiscation more shocking to
103 decency, honor, and justice and more pernicious and demoralizing in its effect upon public sentiment than the operation of all the lotteries which the Commonwealth has created since its organization as a State. Because the abolition of lotteries is a desirable end, are the courts to trample down the constitutional safeguards thrown around the sanctity of contracts and destroy vested rights resting upon them in order to accomplish the desired end? Is this the policy or morality of the law? If such a doctrine as this is to receive judicial sanction, what is to be the consequence? Are contracts at the mercy of legislative caprice? How calamitous the consequences that must follow from the adoption of such a principle by the courts. The ends justify the means. While its suppression in this particular instance might be cheerful and pleasing to many, who can foretell in what direction or against what other contract rights legislative or political caprice, whim, or prejudice may direct its baleful operation in the future? Who can define the sphere within which its obliating energies shall be curtailed? Trample down the barrier of the Constitution thrown around contracts, strike down the safeguards of the Constitution thrown around the personal safety, the personal liberty, and the private property of the citizens at the behest of public sentiment and what civil right of the citizen is safe?

The framers of the Federal Constitution in erecting that impregnable bulwark, section 10 of article 1 of the Constitution of
104 the United States, for the safety and protection of the contract rights of every citizen of the Union against impairment and annullment by State authority, were not unmindful that the legislatures of States and even their constitutional convention might sometimes act under the strong impulses of public passion and prejudice and political excitement, sometimes inadvertently, and that ofttimes the good intentions of the many would be misled by the unscrupulous management and intriguing talent of cunning demagogues and unreasoning enthusiasts. They were mindful that the policy of the States by which their public councils are directed would fluctuate with the changing temper of the times, and that political caprice and public sentiment would dictate legislation in violation of the contractual obligations of the citizen; therefore it was that they imbedded in the supreme organic law of the Union the prohibition against any State, either by its constitution or legislative enactment, passing any law impairing the obligation of contracts. It was a maxim of Bractom, taken from the civil law that they crystalized into the supreme law of this land, that the law-giver could never alter his mind to the prejudice of a vested right. (*Nemo potest mutare consulium suum in alterius injuriam.*) Every judge of a State court in the Union is bound to uphold and protect this provision of the Federal Constitution, even though in doing so it may sometimes become his duty to declare the enactments of the State legislature and the provisions of the consti-

tution of his own State inoperative as in conflict therewith. Were
the judge of a court a Roman prætor under Justinian, whose
105 edict was the law of the case, or the viceroy of an Asiatic
prince, a Persian satrap, a Turkish pashaw, or a minion of the czar of Russia, he might disregard the supreme injunction of the Federal Constitution by applying to himself the memorable sentence of the Roman pontiff, "*Licet hoc de jure non possumus, volumus tamen de plentitudine potestatis,*" and declare the law according to his own notion of right and wrong. Such is not our frame of government nor the duty of its judiciary. The self-evident truth will not be denied that it was perfectly competent for the State to create and bestow the license in question upon the board of councilmen of the city of Frankfort. It is equally manifest and undeniable that the State had authority and did empower the city of Frankfort to sell the grant, and the demurrer admits that the board of councilmen of Frankfort, by regular proceedings in conformity to the requirements of the act, did sell the privilege to E. S. Stewart by a valid binding contract, and the property, the subject-matter of that contract, passed under it and vested in E. S. Stewart, the purchaser, an estate resting in contract which cannot now be destroyed without breaking down those constitutional defenses under the provision of the Federal Constitution above cited which secures to every citizen in the Commonwealth the enjoyment of that to which he holds legal and equitable title against encroachment and spoliation by the State. The State cannot arbitrarily impair and repudiate the obligations of the contract between the city of Frankfort and E. S. Stewart with refer-
ence to the lottery privilege purchased by him upon the
106 barren pretense that in so doing it is only exercising an unvendable police power over public morals. By authorizing the city of Frankfort, its grantee, to sell the said privilege to a purchaser for value, it withdrew the subject-matter of the sale from under its police surveillance and invested it with the elements and essential attributes of a contract right over which it had no jurisdiction or power of annulment when in the hands of a purchaser as a vested estate. Certainly the Commonwealth's power and control over the public revenue and over the entire subject of taxation is an element of sovereignty as fundamental and unvendable as its control over matters of police. Yet when the power of taxation is delegated by the State to a municipality for the purpose of enabling it to issue and float its bonds, no subsequent act of the State revoking the power of taxation conferred upon the municipality is valid against an intervening purchaser of said bonds until his contract right to have said bonds paid by municipal taxation is satisfied. To the extent of the vested contract rights of the bondholder to have the municipality exercise its delegated right of taxation for the payment of said bonds, the Commonwealth has lost its political authority over the subject of taxation conferred upon said municipality. Undoubtedly as between the State and the municipality the delegated power of taxation could be controlled and resumed by the legislature in virtue of its sovereignty. Indeed, the

State could abolish the municipality as a corporate entity al-
107 together and annihilate the delegated authority conferred upon it, but the purchaser of the bonds of the city has a vested contract right in the enforcement of the city's delegated right of taxation under the statute conferring the power upon said municipality to tax the people for the payment of the bonds, principal and interest, which the State, in the exercise of its sovereignty, could not impair or revoke. By conferring upon the city the power of levying a tax for the payment of the bonds, the State would remove the subject of taxation as delegated from under its unvendable political power to the extent of the vested rights of a purchaser of said bonds to have them satisfied by an enforcement of the power of taxation delegated to the city. This was expressly decided by the Supreme Court of the United States in Von Hoffman *vs.* The City of Quincy, 4 Wall., 535, and it may be remarked with somewhat of pride to Kentucky that the Supreme Court in the case cited rested its decision upon the case of The Covington & Lexington R. R. Co. *vs.* Kenton County Court, 12 Ben. Monroe, 147, *supra.*

In The Sinking Fund *vs.* Green and Barren River Navigation Company, 79 Ky., 73, the legislature, by an act passed in April, 1880, undertook to impair a contract between the State and said company, made in 1868, by repealing the former act. Judge Pryor, in delivering the opinion of the court, held that the Green and Barren River Navigation Company had vested rights of property by reason of its charter which it was not competent for the legislature to impair. Said he: "The only question is, had the legislature the power to annul the contract? We think not
108 and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void. * * * That the right of the said company to the tolls and benefits of this line of navigation originated from the contract made with the State, and any legislation impairing its obligation without the consent of the appellee is a violation of the Constitution."

In Whipps *ads.* The Commonwealth, 80 Ky., 271, which was a prosecution under indictment of Whipps for operating a lottery authorized by an act of 1880 for the purpose of disposing of the Willard hotel for the benefit of his creditors, Judge Pryor, in delivering the opinion of the court, among other things, said: "Lottery grants are now in existence in this State and their constitutionality has never been denied. * * * The motive prompting the legislature to make the grant cannot be inquired into by this court. Plenary power in the legislature for all purposes of civil government is the rule with uncontrolled authority in making the laws within the limits of the constitution. This court has nothing to do with the moral question involved; if it had the case could be easily disposed of. The legislature makes, the executive executes, and the judiciary construes the laws."

(Citing Cooley on Constitutional Limitations.)

The facts of the case were these: Whipps was involved in debt and the legislature upon his application granted him the privilege

of selling his property by lottery at a single drawing, the proceeds to be applied to the payment of his indebtedness. The Commonwealth, after making the grant, indicted Whip-s for proceed-
109 ing to act under it, and insisted that he should be fined in a sum not exceeding $10,000 for promoting a lottery. The court of appeals, speaking through Judge Pryor, held that the penalty could not be enforced against Whipps. To the same effect is the case of The Public Library of Kentucky *vs.* A. W. Littell, decided in 1877, Judge Lindsay delivering the opinion of the court. Speaking of the lottery grant in this case, Judge Lindsay said: "The responsibility for the evils resulting from legislation like this rests with the law-makers and not with the courts, and it is neither their duty nor their right to undertake to correct or limit such evils by encroaching on the exclusive domain of legislative power. The lottery grant is not void by reason of the provisions of section 32, article 2, of the State constitution. It is a legitimate, although it may be an objectionable, mode by which to raise the funds necessary to establish the free library."

In Phalan *vs.* Virginia, 8 Howard, 163, the opinion of the Supreme Court of the United States was delivered by Mr. Justice Greer. The legislature of Virginia had authorized the raising of the sum of $30,000 to build three miles of turnpike road in Fauquier county, in that State, in December, 1828. By an act of the legislature of Virginia approved the 29th of February, 1834, for the suppression of lotteries, severe penalties were denounced against the operation of lotteries and the sale of lottery tickets in that State after the 1st of January, 1837, with the following proviso to said act: "Provided, nevertheless, that nothing herein contained shall be construed to extend or interfere with any con-
110 tract which may hereafter be made under or by virtue of any existing law authorizing the same for the drawing of any lottery, the drawing whereof shall not extend beyond the 1st day of January, 1840." After the passage of this prohibitory and penal statute two commissioners were appointed under an act approved the 11th of March, 1834, to carry into effect the act of the 30th of January, 1829. On the 19th of December, 1839, the said commissioners entered into a contract with Phalan and another authorizing them to draw as many lotteries as they might think proper, paying to the commissioners the sum of $1,500 a year. It will be observed that no contract had been made under the act of 1834 at the time when this subsequent repealing act was passed. Judge Greer, in delivering an eloquent malediction against lotteries, in his opinion, when he came to speak of the repealing act of the Virginia legislature, said: "When the legislature of Virginia passed this most salutary act for the suppression of lotteries they with commendable caution protected all vested rights."

In the case of State *vs.* Phalan & Paine, 3 Harrington (Delaware court of errors and appeals), page 451, the facts were these: In 1827 the legislature of Delaware passed an act granting to certain-named managers the power, privilege, or franchise of operating a lottery to raise $10,000 to be applied by said managers to the build-

ing of an academy and Masonic hall, and the surplus, if any, to the finishing St. Paul's Episcopal church, in the town of Georgetown, in said State of Delaware. Section 3 of said act conferred on
111 said managers the power and authority to sell and dispose of said lottery privilege or franchise or any class or classes thereof.

On the 14th day of January, 1839, the said managers, under and by virtue of the authority conferred upon them by the act of 1827, sold the said lottery privilege for the term of five years to James Phalan and Daniel Paine for $10,000, to be paid in ten semi-annual payments, beginning the 1st of March, 1839. In said contract of purchase by Phalan and Paine it was provided "if James Phalan and Daniel Paine or their assigns shall be prevented by judicial or legislative interference from drawing said lottery in the State of Delaware during said term of five years, then the contract, if they so elect, to be void and of no effect; otherwise to remain in full force and virtue."

By section 1 of an act of the legislature of Delaware passed in 1841, two years after the sale of the lottery privilege to Phalan & Paine, it was provided that the contractor or contractors for any lottery authorized by any law of the State shall, immediately upon the drawing of each and every scheme or class of such lottery, or within ten days thereafter, pay the sum of $10 for each and every scheme or class so drawn to the trustee of the school fund, to be applied to and for the benefit of the fund for the establishing of schools in the State of Delaware, and the further sum of $50.00 upon the drawing of each and every scheme to be applied upon the fund to be raised by said lottery.

The action — brought in the name of the State against
112 Phalan and Paine to collect said sums due under the act of 1841 for the benefit of the school fund of the State of Delaware. Phalan and Paine, the purchasers of the lottery privilege and defendants in the action, resisted the collection of the said sums upon the ground that the act of 1841, under which the action was brought, impaired the obligations of their contract of purchase of said lottery privilege from the managers or first grantees of the State. The question was reserved for hearing before all the judges of that eminent court, composed of Richard H. Bayard, chief justice, with Associate Justices Booth, Johns, Harrington, Layton, and Milligan. The State was represented in the action by Edward W. Gilpin, attorney general of the State.

The opinion of the full court, delivered by Mr. Justice Johns, holding the act of 1841 to be — contravention of section 10 of article 1 of the Constitution of the United States as impairing the obligations of the contract of purchase between Phalan and Paine and the managers of the lottery, used the following language: "We all agree that the act of 1827, authorizing the lottery to be drawn, is neither a grant nor a contract. It is a bare delegation of authority by which the drawing of the lottery is sanctioned until a certain amount or sum shall be raised for a certain purpose. If the act had confined the authority to the simple agency of the managers on

behalf of the State, the question now presented might not have
curred; but in the act we find the managers are empowered to ra
the sum of $10,000 either by drawing the lottery themsel
113 or through their agents or by a sale of the powers granted
the lottery act. Hence, although we regard the act as ma
ing no grant or contract with the managers, we cannot disrega
the authority granted to them to make a contract with others fo
valuable consideration which would be binding on the Sta
While the authority or power delegated remained in the hands
the managers or agents of the legislature it was subject to the co
trol of the legislature, either to repeal, modify, or change. As
mere letter of attorney it could be revoked; but from the time wh
a contract was made under the authority conferred by the act
make a sale a new state of things took place; an authorized contra
between the managers and third persons for a valuable consider
tion conferred new rights and imposed new obligations. The co
tract, having been made in pursuance of the powers contained
the letter of attorney and in strict conformity therewith, as also
give effect to the purpose therein intended, must be obligatory upo
the principal; nor under such circumstances can it be compete
for the principal, even should he revoke the letter of attorney,
annul or even impair the contract; its obligation rests upon him
strongly as if he had himself primarily made it and received th
consideration paid.

Regarding, therefore, the legislature as the principal under who
authority the act of 1839 was made, we do consider they had n
right to violate this contract or so revoke or modify the contract a
to impair its obligation; but the act of 1841 does not assume to r
voke its authority, but to modify by regulating the exerci
114 of the powers delegated after the same had become the pro
erty of third persons as purchasers by sale, that act reco
nizing the existence of certain lottery grants as under contract, an
affirming that with respect to such they had no right to prohibi
* * * Upon such a contract and the rights vested and exercise
under it after the lapse of two years from its execution, the legisla
ture, by the act of 1841, declared that all persons drawing lotterie
should pay to the school fund $10 for each drawing and $50 to th
parties entitled to the purchase-money to be credited on accoun
thereof. The simple question we have to settle in the present cas
is, does this addition of $10 on each drawing and variation of th
time of payment of the installments of the purchase-money b
requiring $50 thereof to be paid at each drawing interfere with th
contract made with Phalen & Co. in the year 1839, so as to impai
the obligation thereof? It has been said that this was no additiona
charge impairing the contract, because it would come in as a charge
and the defendants would have the right to draw on to realize th
additional sum. We entertain a very different opinion. The par
ties by their contract agreed to no such thing. The defendan
agreed to pay $10,000 for the privileges of the lottery act of 1827 with
the then existing charges. If the legislature could add $10 on each
drawing they might add $1,000. It is a question of power and no

of amount. So as to the imposition of $50. If they can vary the time of payment of a part of the purchase-money, why not the whole. But we consider it out duty to say the legislature had no right thus to add to or vary the contract of 1839, and that
115 such addition and variation thereof, as it increases the amount which the defendant agreed to in five years to pay for the exercise of a privilege during five years, and also varies the mode and time of payment of the sum agreed to be paid, it necessarily has the effect of impairing the obligation of the contract. Independent of the Constitution of the United States, the act, although clearly contrary to right and incapable of being sustained, yet as the act of a sovereign power might be valid, for it is not always that power regards right. Experience teaches that power unlimited often tramples upon and disregards private right; but when we turn to the clause in the Constitution of the United States which appears there inserted as a shield and defense against all legislative action by a State impairing the obligation of contracts, we feel authorized to say not only that the legislature had no right, but they had no power, to regulate in the manner attempted by the act of 1841 the existing contract of 1839."

In The State of Missouri *vs.* Miller, 50 Mo., 129, the State of Missouri, through its legislature, by an act passed in 1833, had conferred upon the town of New Franklin, in that State, the right to raise money by lottery for the purpose of aiding in the construction of a railroad from that town to the Missouri river. By an act of 1835 power was conferred upon the town of New Franklin to sell the lottery franchise for the purposes aforesaid. In 1842 Walter Gregory purchased the said lottery grant under the authority of the act of
1835. Afterwards by a constitutional ordinance almost identi-
116 cal with section 226 of the present constitution of Kentucky, the lottery grant to the town of New Franklin was revoked and the operation of all lotteries prohibited in that State. Gregory sold the lottery privilege which he had purchased from the town of New Franklin to George Miller, and Miller was indicted and convicted in the court of criminal correction of St. Louis for selling lottery tickets under the New Franklin lottery grant which he had purchased from Gregory as aforesaid. On appeal, reversing the decision and directing Miller to be discharged, Judge Wagner, of the supreme court of Missouri, held that the transfer of the lottery to Gregory in 1842 constituted a valid contract, which could not be impaired by subsequent legislation. Said he: "Where a contract when made is valid by the laws of a State as then expounded by the departments of the Government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its court altering the construction of the law. The establishment and continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property would be a still greater evil."

In the case of The State *ex rel.* The Attorney General *vs.* Miller,

66 Mo., page 329, Mr. Justice Norton, delivering the opinion of the court, said: "Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their
117 privileges rest upon anything like a contract between them and the legislature, but when such a corporation by authority of the State contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State." This last case was a proceeding in the nature of *quo warranto*, just as is the case at bar, exhibited by the attorney general of Missouri on behalf of the State *vs.* the defendant, George Miller, in which it was alleged that he, the said Miller, without warrant and in violation of law, was engaged in selling lottery tickets under a pretended franchise, and praying that he be required to appear and show by what authority he assumed to exercise the said right. Miller in the case of the *quo warranto*, as in the criminal prosecution against him in the said State above cited, was operating a Missouri State lottery under the Gregory contract of June, 1842, purchased by Gregory from the town of New Franklin. Said Judge Norton, among other things: "So long as the power conferred by the act of 1835 upon the trustees of the town of New Franklin to contract with other persons for the drawing and managing said lottery remained unexecuted by them, the State through its legislature could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts. When, however, this power is executed (the power to sell the franchise) and a contract concluded whereby a third person acquires the
118 right to conduct and manage a lottery another and a different question is presented, and the rights thus acquired become vested by the act of the State and cannot be taken away except by the terms of the contract" (citing State *vs.* Miller, 50 Mo., 129; Clark *vs.* Mitchell, 64 Mo., 576). * * * "As to the impolicy," continued Judge Norton, "of the act of the General Assembly in granting the privilege it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized against the sense of the people of the State and to the debauchery of the public morals, we have nothing to say. Nor have we anything to do with the fact that the trustees in making the Gregory contract and the legislature in ratifying them have acted unwisely and continued till the year 1877 a business yielding large profits and gains to one contracting party and comparatively small to the other. We are to look at the contract, and, if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of persons and property demands a strict adherance to this rule and it cannot be overreached, even though the purpose be to correct a supposed or real great evil."

In Miss. So. of A. & S. *vs.* Musgrove, 44 Miss., Judge Simrall, delivering the opinion of the court, said: "The State may take away

by statute what has been given by statute unless rights under it have vested. If the legislature delegate authority it can evoke it if nothing has been done under it which creates a vested right.
119 * * * The authorities are abundant that the legislature may repeal a lottery grant unless contracts have been made or rights vested as between the grantee and other parties which could be infringed by the repealing law. (Citing Gregory's Executors *vs.* Trustees of Shelby College, 2 Metcalf, 589; State *vs.* Hawthorne, 19 Mo., 391; State *vs.* Freleigh, 8 Mo., 615.)

To the same effect and touching a subject wholly within the police powers of a State is the decision of the Supreme Court of the United States in the case of Joliffe *vs.* Steamship Company, 2 Wallace, 450, opinion by Mr. Justice Field; but notwithstanding this unbroken chain of authorities by the most eminent State courts of the Union and the firm judicial adherence by the court of appeals of Kentucky to the doctrine of the sanctity and inviolability of vested contract rights we are told that it has all been set aside, repudiated, and annulled by a dictum of Mr. Justice Waite in the case of Stone *vs.* Mississippi, reported in the 101 U. S., 814. The facts in that case are briefly these: The State of Mississippi, by an act approved February 16, 1867, incorporated the Mississippi Agricultural and Manufacturing Aid Society and conferred upon the said company or corporation the privilege of operating a lottery for the space of 25 years. On the 15th of May, 1868, the constitutional convention of that State adopted a new constitution, which was ratified by the people of Mississippi on December 1st, 1869.

By section 16 of the said constitution it was declared that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery hereto-
120 fore authorized be permitted to be drawn or tickets therein to be sold." The legislature of Mississippi, by an act approved July 16, 1870, passed an act entitled "An act enforcing the provisions of the constitution of the State of Mississippi prohibiting all kinds of lotteries within said State and making it unlawful to conduct one in this State." On the 17th of March, 1874, the attorney general of Mississippi filed an information in the Warren circuit court of that State in the nature of a *quo warranto vs.* John B. Stone and others, alleging that without authority or warrant of law they were then and for the preceding twelve months had been carrying on a lottery or gift enterprise within said county and State under the name of the Mississippi Agricultural, Educational and Manufacturing Aid Society. The information further charged that the said society had obtained its charter and right to operate the lottery privilege or gift enterprise from the legislature of the State, but set forth the constitutional provision above quoted and the act of the legislature thereunder of July 16, 1870, and averred that the charter was thereby virtually and in effect repealed. The defendants in their answer admitted that they were carrying on the lottery enterprise, but averred that in so doing they were only exercising the rights, privileges, and franchises conferred upon them by the act of February 16, 1867, and that they had in all things complied with

its provisions, and they claimed as a matter of law that their
121 rights and franchises were not impaired by the said constitutional provision and the legislative act thereunder on which the Commonwealth relied. The case was submitted, and the lower court held that the act conferring the lottery franchise upon the defendants, grantees or licensees of the State, was abrogated and annulled by the said provision of the constitution of 1868 and by the legislation thereunder of July 16, 1870, and gave judgment of ouster against the defendants. On appeal the judgment was affirmed by the supreme court of Mississippi, and from that judgment a writ of error was taken to the Supreme Court of the United States. These were the facts of the case presented for adjudication in that tribunal.

It will be seen that no contract had been made by the grantees of the lottery privilege with any third person touching the said franchise. No intervening contract rights by purchaser existed. There was no claim to the lottery privilege by any one except the original grantees themselves from the State. The franchise stood in the name of the original legislative grantees with the undoubted power in the legislative department of the State government of Mississippi to recall it at any time. No sale of the privilege had been made and no authority conferred by the State upon the grantees to make any sale or contract with reference thereto, and there *was* no rights of third parties intervening and no contract right claimed whatever to the said privilege other than that of a gratuitous donee holding
under the permission of the State. Why, it is more than
122 surprising that it should have ever been disputed for a moment by the legislative grantees in that case that they held only *durante bene placito* or that they should have challenged the right of the State to recall its bounty held by them, not under any contract, but merely as tenants at will or by sufferance. Mr. Chief Justice Waite decided, and could only decide, the question presented by the record for the court's decision, and that was whether or not, under the facts stated, the grantees had contract rights which were protected by section 10 of article 1 against impairment by the State of Mississippi. His opinion is a short one, of five pages in length.

There were no briefs filed in the case and it doesn't appear from the report that it was argued by counsel. Certain it is that the learned Chief Justice does not cite or refer to a single decision on the question of intervening contract rights of third parties. As the question was not presented it was proper that such cases should not be referred to. He begins his opinion, however, with the statement that "it is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause of the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts" (citing article 1, section 10, of the Federal Constitution). "The doctrines," says he, "of Trustees of Dartmouth College *vs.* Woodward, 4 Wheat., 518, announced by this court more

than sixty years ago, have become so imbedded in the juris-
123 prudence of the United States as to make them to all intents and purposes a part of the Constitution itself." In this connection, however, it is to be kept in mind that it is not the charter which it is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently the first inquiry in this class of cases always is whether a contract has in fact been entered into; and, if so, what its obligations are. In the present case the question is whether the State of Mississippi in its sovereign capacity did by the charter now under consideration bind itself irrevocably by a contract to permit the Mississippi Agricultural, Educational and Manufacturing Aid Society for twenty-five years "to receive subscriptions and sell and dispose of certificates of subscription, etc., by casting of lots or by lot, chance, or otherwise," which the court held to be to all intent and purposes a lottery. The learned judge held, in accord with all the decisions in the State courts of the Union where the question has been presented, that the grant by Mississippi to the society was not a contract between the State and that corporation; that was exactly the doctrine laid down by the court of appeals in Gregory *vs.* Shelby College, 2 Metcalf, to which we have referred. It is a doctrine that has never been disputed in Kentucky. It is a doctrine that was announced by Judge Simrall in Musgrove case in 44 Miss., above cited. It is the same doctrine announced by Judges Wagner and Norton in the Missouri
124 cases to which I have referred and by the supreme court of Connecticut in State *vs.* Phalan, *supra*. All the authorities hold that the legislature of a State cannot bargain away its police power to a grantee or licensee, but Judge Waite in Stone *vs.* Mississippi does not decide, because he was not called upon to decide, whether or not, if the State had authorized its grantee, the Mississippi Agricultural, Educational and Manufacturing Aid Society, to sell and convey to a purchaser for value the right to operate that lottery, and a purchaser, acting upon the faith of the authority conferred by the State upon its grantee to make the sale, had entered into a contract to purchase with said society and had bought the privilege, the State by a subsequent act of its legislature of constitutional convention could impair and annul the obligations of said contract by confiscating and destroying the subject-matter of the sale. "All agree," said he, "that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State. No legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." The learned judge further held, what no one can dispute, that lotteries are proper subjects for the exercise of the police power of a State. He quotes with approval the philippic of Mr. Justice Greer in Phalan *vs.* Virginia, 8 Howard, *supra*, against lotteries, but omits to refer to
125 his eulogy upon the commendable caution of the law-making power of Virginia, when repealing the Farquier lottery grant,

in providing for the protection of contract vested rights touching said lottery grants. I do not see that Stone *vs.* Mississippi, relied upon by the distinguished counsel for the Commonwealth, has any bearing or pertinency to the constitutional question raised by the demurrer in this case. There were no contract vested rights of property involved in Stone *vs.* Mississippi, and therefore the court, through its learned Chief Justice, has nothing to say upon this subject in the opinion in that case. Singularly enough, in the case of Houston *vs.* City of New Orleans, 119 U. S., 265, when the same learned Chief Justice was called on to decide whether or not the Louisiana State Lottery Company had a valid contract with the State of Louisiana in its sovereign capacity, by which the said State had bound itself irrevocably to allow that company to operate its lottery franchise in that State, held that the grant of a charter to the Louisiana State lottery by the sovereign State of Louisiana did bind the Commonwealth irrevocably in the first instance, because the grant was contained in the constitution of the State of Louisiana. He held that the grant of the charter in the constitutional provision conferring the lottery privilege upon the Louisiana State Lottery Company withdrew the lottery franchise from the scope of the police power of the State, to be exercised by the General Assembly, so far as that company was concerned.

126 The learned Chief Justice says no one will dispute that proposition. I shall not attempt to reconcile the two decisions nor comment upon the obvious omission of that distinguished jurist to recognize in the case of Houston *vs.* City of New Orleans the fact that the acts of a State through her legislature, when not in contravention of any provision of the State *of* Federal Constitution, i*n* as much an act of sovereignty until repealed as any declaration of a constitutional convention imbedded in the organic law of a State. A State legislates not by permission of constitutional grant; it is not a government of delegated powers as the Federal Government is, but it is a sovereignty bespeaking its sovereignty through its legislature and is only restrained and limited in its legislative jurisdiction by the limit — actions contained in the State and Federal Constitution.

I agree that it is not my province to discuss the irreconcilable contrariety apparent between these two decisions of the Supreme Court of the United States. It is necessary, however, and eminently proper for this court to demonstrate, as I think has been done conclusively, that Stone *vs.* Mississippi is an authority against the Commonwealth in this ac- rather than in favor. If the dictum of Chief Justice Waite in Stone *vs.* Mississippi can be considered as inconsistent with the unbroken current of decisions by our court of appeals on the issues of law under consideration (and I think it is not), it is important to observe that it was after the decision

127 of that case that our court of appeals considered and decided the cases of the Commonwealth *vs.* Douglas and against Frankfort and Webb above cited. If the doctrine of Stone *vs.* Mississippi is in conflict with the subsequent decisions of our court of appeals (and I cannot see that it is), I have no hesitation in saying

that this court has neither the inclination nor the right to turn its back upon the doctrine of the sanctity and inviolability of vested contract rights so ably and unswervingly vindicated by the court of appeals of Kentucky in order to follow the dictum of the learned Chief Justice of the Supreme Court of the United States in a case in which the question was not before the court for adjudication, particularly as the decision of our court of appeals holding that contract vested rights of the citizen is inviolable either by State statute or by State constitution is binding and final and under the 25th section of the judiciary act is not revisable by the Supreme Court of the United States.

The provision of our present State constitution, section 226, prohibiting the granting of lotteries in the future and revoking all lottery grants now extant in this State has a wide and useful field upon which its remedial energies may be expended. What is its effect? It forever prohibits the creation of any lottery privilege or franchise in this State and it revokes and annuls all lottery privileges and franchises already granted. It does not, however, annul
or undertake to annul the obligations of the contract between
128 E. S. Stewart and the city of Frankfort which the State, in its sovereign capacity by a special act authorized the city of Frankfort to make. What the convention which framed the constitution and the people who ratified and adopted it actually meant and intended to mean was to forever prohibit the creation or granting of any lottery privilege in this Commonwealth again and to repeal and extinguish all lottery grants and privileges in the hands of grantees of the State and otherwise where it would not impair the obligation of contracts or destroy vested contract rights. Surely the convention did not intend to attempt to do that which, if they were not profoundly ignorant of the law as repeatedly expounded by the supreme court of this State, they must have known they had no constitutional power to do—namely, to destroy contract rights and vested property rights growing out of contracts which the State of Kentucky had expressly authorized to be made.

Had no ordinance or provision been proposed in the constitutional convention by any member of that body to annul and set aside the contract between E. S. Stewart and the city of Frankfort by which, under express authority from the State, the said Stewart had bought from that city for a valuable consideration the lottery franchise conferred upon it by the act of 1869, there were statesmen and constitutional lawyers in that convention who walked the high rounds of the profession who would have said, "No; that cannot be done. We cannot divest the title and confiscate the property
rights of Stewart and his assignees held by them under a
129 contract which Kentucky authorized the city of Frankfort to make with them." They would have said: "In the hands of the grantees from the State we can annul the lottery franchise because it is a mere gratuity, license, or privilege which the State in her sovereignty can revoke, and we can prohibit through all time the granting of any other lottery franchise in this Commonwealth," and in lieu of the communistic provision or ordinance to invalidate

the contract between Stewart and the city of Frankfort and between the defendant Douglas and Annie B. Stewart, and to confiscate the vested rights of property acquired by E. S. Stewart and his assignees under his contract with the city of Frankfort, the lawyer and statesman would have offered section 226 of the present constitution just as it is written, which does not and in my judgment cannot affect the rights of the defendant in this action. This is the conclusion at which I am constrained to arrive after giving the subject my best though- and most earnest consideration. It is strictly a legal judgment which I am required to make; one in which no element of temporary excitement or public prejudice should enter. It is purely a judicial question of constitutional law submitted to a Kentucky court of justice for a decision, and he is worse than an enemy to the State who would have it otherwise decided than upon strictly legal grounds; and why should the decision of any court of justice be based upon any other ground?

Are the courts to bend to the winds of occasional doctrine,
130 to consult the weather-vane of popular sentiment? Is a judge who is sworn to decide the law without fear or favor to pander to public clamor or popular sentiment? Is the integrity of the administration of justice to be subordinated and debauched by public prejudice? Are the courts at the demand of a public sentiment, however virtuous and well meaning, to lend their aid to the breach of contracts fairly made and specifically authorized by the law-making power of a State and repeatedly sanctioned by the decisions of the supreme judicature of a State in order to appease and gratify the moral or political sentiment of the community? It is not improper nor out of place for me to suggest these inquiries, because since this case has been under consideration some newspapers have so far confounded the liberty of the press with its unbridled license as to speak in a tone approaching that of command and of menace concerning the decision to be expected from this court. Such a perverted sense of the duty of the press is greatly discreditable to the character of journalism, as well as disrespectful and injurious to the court. Such conduct is an outrage upon the administration of justice, and, it is believed, is offensive to that decent public sentiment which would be most pleased could this court see its way to render a judgment against the defendant. Such conduct, I cannot refrain from saying, is detrimental to the public weal, because there might be judges—it is believed there are none such in this State—
who could be reached and influenced by such disreputable
131 methods. It is no choice of mine, but an official duty, that I have to decide this case at all; but I do not shrink from the demands of that duty nor would I shirk the responsibility which it imposes. I adopt the language of Mr. Chief Justice Marshall on an occasion not dissimilar to this, when he knew his decision was in contravention of the wishes and sentiments of a large, respectable public element (I refer to the trial of Aaron Burr). "No man," said he, "is desirous of placing himself in a disagreeable situation; no man is desirous of becoming the peculiar subject of calumny; no man could he let the bitter cup pass from him without self-reproach

would drain it to the bottom, but if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprob-ium of those who are denominated the world, he merits the contempt, as well as the indignation, of his country. Who can hesitate which to embrace?"

The demurrer of the Commonwealth is overruled.

STERLING B. TONEY, *Judge.*

132 STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court and *ex officio* clerk of the Louisville law and equity court (common law), do hereby certify that the 130 pages attached hereto contain a true, correct, and complete copy and transcript of the record in the action mentioned therein, Commonwealth of Kentucky *vs.* Frankfort Lottery, &c., as appears of record in my office.

Given under my hand as said clerk this 13th day of July, 1892.

JNO. S. CAIN, *Clerk.*

133 Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 5th day of September, 1892, the following order was made:

Order Motion to Advance.

(Louisville Law & Equity.)

COMMONWEALTH OF KENTUCKY }
vs. }
J. J. DOUGLAS. }

Came the attorney general and filed grounds and moved the court to advance this case and set it for an early day for hearing; which motion being heard, the court took time.

The following are the grounds filed by the foregoing order:

Grounds Filed.

Kentucky Court of Appeals.

COMMONWEALTH, Appellant, }
vs. } Motion.
DOUGLAS, Appellee. }

and

DOUGLAS, Appellant, }
vs. }
THE COMMONWEALTH, Appellee. }

In accordance with the provisions of the resolution of the General Assembly, directing the attorney general to institute *quo warranto*

proceedings against the lotteries, a copy of which is filed with this motion, I now move to advance these causes upon the docket with a view to a speedy hearing.

WM. J. HENDRICK,
Attorney General.

134 The following is the resolution referred to in the above grounds:

Resolution.

Resolution directing the attorney general to prosecute lottery companies.

Whereas, the General Assembly of the Commonwealth of Kentucky, by an act, entitled, "An act for the benefit of Henry Academy and Henry Female College," approved the ninth day of December, one thousand eight hundred and fifty, conferred upon the managers therein named lottery franchises; and whereas, the General Assembly of the Commonwealth of Kentucky, by an act, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved the sixteenth day of March, one thousand eight hundred and sixty-nine, conferred lottery franchises upon the board of councilmen of said city, and by another act, entitled, "An act, amendatory of the laws in relation to the city of Frankfort," approved twenty-eighth day of March, one thousand eight hundred and seventy-two, the said board of councilmen was authorized to sell the lottery franchises therein conferred upon it; and whereas, the General Assembly at its last session repealed each of said acts, and other acts, which confer lottery franchises; and whereas, the constitution revokes all lottery charters and privileges heretofore granted; and whereas, it is believed, that section two hundred and twenty-six of the constitution, recently adopted, terminates and destroys all lottery charters and privileges heretofore granted by the General Assembly; therefore,

Resolved by the General Assembly of the Commonwealth
135 of Kentucky:

SEC. 1. That the attorney general be, *be* and he is hereby, directed and authorized to immediately institute and prosecute such legal proceedings as may be necessary to suppress or revoke all lotteries or lottery franchises, privileges or charters, operated in this Commonwealth. The reason for the emergency, which demands that this resolution take effect from its adoption, is, that lotteries are believed to be openly conducting their business, in defiance of the constitution and laws. Provided, that owing to an existing and clearly recognized emergency, the adjudication of any and all litigated causes growing out of acts of the General Assembly which look to the control, regulation or suppression of any or all lotteries heretofore doing, or proposing to do, business in the State of Kentucky, shall be so advanced on the dockets of the courts of this Commonwealth as to give those causes such precedence as will bring

speedy ending to all such suits, whether now before the courts or hereafter submitted for their determination.

SEC. 2. By reason of the emergency heretofore stated, and hereby declared to exist, this resolution shall take effect from its adoption.

W. M. MOORE,
Speaker House of Representatives.
D. H. SMITH,
President of the Senate pro Tem.

Approved Jan. 30, 1892.
JOHN YOUNG BROWN, *Gov.*

136 By the governor:
JOHN W. HEADLEY,
Secretary of State.

COMMONWEALTH OF KENTUCKY:

OFFICE OF SECRETARY OF STATE.

I, John W. Headley, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof I hereto sign my name and cause my official seal to be affixed.

Done at Frankfort this 9th day of January, A. D. 1893.

JOHN W. HEADLEY,
Secretary of State,
By EDW. O. LEIGH,
Assistant Secretary of State.

Afterwards, at a court of appeals held as aforesaid on the 8th day of September, 1892, the following order was entered herein:

Ord. Set for Oral Arg.

The court being advised, it is ordered that this case be set for oral argument on the 4th of October, 1892.

Afterwards, on September 13, 1892, at a court of appeals held as aforesaid, the following order was entered herein:

Order Submit Motion to Strike Case from Docket.

Came the appellee, by counsel, and filed grounds and
137 moved the court to strike this case from the docket, and the cause is submitted on said motion.

(The grounds referred to in said order are not found among the papers of this case.)

Afterwards, on September 27, 1892, the following order was entered herein:

Order Statement Filed.

The attorney general filed the following written motion herein, to wit, pending the motion of the appellee to strike this case from the docket a statement such as is directed by the 739th section of the Civil Code is herewith presented, and the appellant now moves the court, in case it should determine that a statement was necessary, that said statement be filed now for the time when it was due to be filed.

(The statement referred to in the foregoing motion cannot be found among the papers of this case.)

Afterwards, on September 29, 1892, the following order was entered herein:

Order Overrule Mo. to Strike Case from Docket & File Statement.

The court being sufficiently advised, it is considered that the motion to strike this case from the docket be overruled at the cost of appellant, and the statement heretofore tendered by the attorney general is ordered to be filed.

Afterwards, on the 4th day of October, 1892, the following
138 order was made herein:

Order Continue.

On motion of appellee, this cause is continued.

Afterwards, at court of appeals held as aforesaid on January 10, 1893, the following order was made herein:

Noting Argument.

This cause, coming on to be heard, was argued by D. W. Sanders for Douglas and Frank Parsons for the Commonwealth and laid over for further hearing on tomorrow.

Noting Argument & Submission.

Afterwards, on January 11, 1893, this cause, coming on to be heard, was argued by John G. Carlisle for Douglas and W. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on December 16, 1893, the following orders and judgments were entered:

Judgment of Court of Appeals.

COMMONWEALTH OF KENTUCKY, Appellant, vs. J. J. DOUGLAS, Appellee. } Appeal from the Louisville Law & Equity Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings in conformity with the opinion herein.

It is further considered that appellant recover of appellee its cost expended herein.

139 On the same day, December 16, 1893, and the same time the following opinion was delivered herein:

Opinion of Ct. of Appeals.

Kentucky Court of Appeals, December 16, 1893.

COMMONWEALTH OF KY., Appellant, vs. J. J. DOUGLASS, Appellee, & J. J. DOUGLAS, Appellant, vs. COMMONWEALTH OF KY., Appellee. } Appeals from the Louisville Law & Equity Court.

Opinion of the court delivered by Chief Justice BENNETT:

These proceedings were commenced and prosecuted by the Commonwealth to prevent the usurpation of the franchise claimed by Douglass to operate said lotteries.

It seems that the legislature in 1850 authorized J. N. Webb to raise money by lottery for the benefit of the Henry Academy and Henry Female College. The 3rd section of the act empowered the grantees to sell the scheme, which they did, and which fell into the hands, by purchase, of the appellant Douglass, who proceeded to operate the same under said grant. He claims that the legislature having authorized the sale of the franchise, and he having become the purchaser thereof, his right to it became a vested right, which the legislature could not thereafter take away, because it would be impairment of the obligation of contracts which article 1, section 10, of the Constitution of the United States expressly forbids.

140 The lower court, upon the hearing of the case, decided that the grant had expired by limitation, and that decision must stand and is affirmed.

In 1838 the legislature granted the privilege to certain gentlemen

to raise money by lottery for the benefit of the city schools of Frankfort, and in 1872 the said act was amended so as to allow the board of councilmen of the city of Frankfort to sell and convey the privileges granted for the purpose mentioned, and the appellee in 1875 purchased all the lottery franchises and privileges conferred by the act of 1838 and also the amendatory act of 1869.

The appellee Douglass contends that he was the purchaser of said franchise, and claims that by reason of the act authorizing the sale of said lottery and the purchase thereof he acquired a vested right which the legislature could not take away by its act of 1890 repealing said franchise, and relies upon article 1, section 10, of the Federal Constitution, which prohibits the States from passing any laws impairing the obligation of contracts as sustaining his contention and the decisions of this court thus construing his purchase.

This court in the case Gregory *vs.* The Trustees of the Shelby College Lottery, 2 Met., 598, decided that a lottery grant might be repealed by a subsequent legislature, unless rights had been acquired and liabilities incurred upon the faith of the privileges conferred by the grant; in which case the rights thus acquired and liabilities incurred became contractual, which the provision *supra* protected from repeal by subsequent legislation. The appellant contends that the grant of the lottery privilege by the State was
141 an exercise of its police, not its contractual power, which is inherently lodged in the State for the promotion and protection of its welfare and happiness, which the State cannot surrender and barter away either as a gratuity or for pay; that while the legislature may, in the exercise of its police power, grant a lottery privilege, the grant is only a privilege or license, not contractual, and a subsequent legislature in the interest of good order and morals may revoke the privilege thus granted and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant.

It seems that this court in the Gregory case, *supra*, decided expressly that when rights had been acquired and liabilities incurred upon the faith of the lottery grant, such rights and liabilities should be regarded as contracts which are protected by the Federal Constitution against impairment by the State legislature, and which should be upheld to the extent, at least, that the party has the right to enjoy the right thus acquired until he realizes his money thus invested out of the lottery business. The famous Dartmouth College case, and others that have followed it, is invoked to sustain this position. The other cases upon the same subject, subsequently rendered by this court, repeat the same doctrine. But the Supreme Court of the United States in Stone *vs.* Mississippi, 101 Supreme Court Reports, 814, in construing the provision of the Federal Constitution that declares that the States shall pass no law impairing the obligation of contracts, held
142 that the inhibition related to "property rights" and not to matters that were "governmental." The court then held in strong and emphatic language that lotteries, being a species of gambling, were vicious and demoralizing in the

community, and that, as it was the trust duty of the State government to protect and promote the public health and morals, it could not sell, barter, or give away that duty, and that the utmost power the legislature could exercise was to grant a license to carry on that species of gambling, which only protected the licensee from the pains and penalties imposed upon that species of gambling during the existence of the license, and that the legislature granting the license had no power to bind a subsequent legislature to its line of policy upon these subjects, and that a subsequent legislature might repeal the grant of the license, although it had been paid for.

It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view.

But, apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual and governmental power of the States, to wit, that the provisions of the Federal Constitution in reference to contracts only inhibits the States from passing laws impairing the obligation of such contracts as relate to property rights, but not
143 to subjects that are purely governmental.

The reason for this distinction must be apparent to all, for when we consider that Honesty, morality, religion, and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agents, cannot throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away.

If it be conceded that the State can give, sell, and barter any one of them, it follows that it can thus surrender its control of all, and convert the State into dens of bawdy-houses, gambling shops, and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals, and good order of the State would be cast to the winds, and vice and crime would triumph in their stead.

Now, it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government.
144 The power of the State to grant a license to carry on any species of gambling or with the privilege of revoking the same at any time has an unwholesome effect upon the community and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day men confined in the State penitentiary for setting up and carrying on gambling shops whose tendencies are not much

more demoralizing, if any, than the licensed lottery operator, wh
goes free under the protection of the law. The one wears a felon
garb and the other is protected by license which he claims as a
irrevocable contract because he has paid for the privilege. Th
privilege ought never to be granted, and under the present const
tution can never be. As said, to impress the privilege with the ide
of contract because it was paid for might fill the whole State, an
especially the cities, with gambling shops and enterprises protecte
by contract, and the few gamblers that might not be thus protecte
and who would be liable to be punished for gambling would not b
because it would strike honest men as unjust to punish the poo
wretch for doing that which was made lawful for others to do b
paying for the privilege. As said, we are bound by the construc
tion given to the provision of the Federal Constitution by the Su
preme Court, relating to the impairment of contracts by the States
to the effect that the provision does not relate to lottery franchises
though paid for, and that, the matter of such grants being strictly
within the police power of the State, the State could not sell or barte
away its control of the subject.

145 It is contended that the subject of the appellee's contract
right is *res adjudicata* by this court.

It is sufficient to say that the State had no constitutional right
to contract its police power away, consequently the appellee made
his purchase of the franchise subject to the right of the State to re-
peal it; and the decision of this court that the appellee's purchase
of the franchise by the authority of the legislature created a contract
that could not under the Federal Constitution be revoked, having
been virtually overruled by the Supreme Court of the United States,
destroys the contention of *res adjudicata;* and while the judge of the
court below was loyal to this court in following the opinions here-
tofore rendered, we must affirm the judgment in the Henry county
lottery case and reverse his judgment as to the Frankfort lottery,
and remand the case for further proceedings in conformity with this
opinion.

Afterwards, on the 29th day of December, 1893, the appellee and
plaintiff in error filed in the office of the clerk of the Kentucky
court of appeals his application for writ of error and his assignment
of errors as follows:

Application for Writ of Error & Assignment of Errors.

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

On application for writ of error, with supersedeas, to the Supreme Court of the United States.

146 J. J. DOUGLAS, Plaintiff in Error, *vs.* COMMONWEALTH OF KENTUCKY, Defendant in Error. } Petition for Writ of Error and Assignment of Errors.

The plaintiff in error in the above-styled cause complains of the judgment of the court of appeals of Kentucky, entered on the 16th day of December, 1893, reversing the judgment of the Louisville law and equity court, and respectfully prays a writ of error, with supersedeas, from the said judgment to the Supreme Court of the United States, and represents that the said court of appeals erred to the prejudice of said plaintiff in error, and he files the following assignment of errors, to wit:

1. The said court of appeals of Kentucky erred to the prejudice of the plaintiff in error in adjudging and directing that the judgment rendered by the Louisville law and equity court in favor of the plaintiff in error against the defendant in error should be reversed, and in adjudging against the plaintiff in error and in favor of the defendant in error the costs in the said case expended. The said erroneous and prejudicial judgment of the said court of appeals of Kentucky was rendered on the 16th day of December, 1893, and the said judgment is erroneous in that it deprives the plaintiff in error of the benefits of the contract made between him and his vendors and the city of Frankfort and the Commonwealth of
147 Kentucky as embraced and evidenced by the acts of the legislature of Kentucky specifically mentioned in the transcript in this case and the contracts entered into by virtue thereof between the city of Frankfort and the plaintiff in error and his vendors, which are specifically mentioned and set forth in the said transcript.

2. It was error prejudicial to the plaintiff in error and in violation of the rights secured and guaranteed to him by section 10 of article 1 of the Constitution of the United States for the said court of appeals of Kentucky, after the passage, approval, and acceptance by the said city of Frankfort of the franchise created and conferred on the said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky and the contracts duly executed by the said city of Frankfort in accordance with the provisions of the said acts of the said General Assembly therein conveying to this plaintiff in error, through his vendors, the said franchise created and conferred on said city

of Frankfort by the said acts of the General Assembly o the Commonwealth of Kentucky enacted as aforesaid, and afte the same had been adjudged and decreed by the said court of ap peals to be valid and this plaintiff in error had acted on the faith thereof and incurred large obligations and expended and is stil liable for large obligations, to adjudge that it was within the powe of the Commonwealth of Kentucky, through her legislature o General Assembly, to repeal the said enactments and divest th appellant in error of the benefits of his contracts acquired by hin thereunder as set forth in the transcript in this case; and i
148 was especially erroneous and prejudicial to the plaintiff i error for the said court of appeals of Kentucky to adjudg and declare that the act of the said General Assembly of the Com monwealth of Kentucky approved March 22nd, 1890, was valid an not in violation of section 10 of article 1 of the Constitution of th United States and operated to deprive the plaintiff in error of th contract rights acquired by and adjudged to him as aforesaid.

3. It was also error and prejudicial to the plaintiff in error *tha* the said court of appeals of Kentucky (as they have done in th judgment complained of herein) to adjudge and declare in effec that section 236 of the present constitution of Kentucky, whic was adopted and went into effect in the month of September, 1891 operated to divest the plaintiff in error of his contract rights ac quired by him as set forth in the transcript of the record in thi case, and in further adjudging and declaring that the said legisla tive and constitutional provisions were not in conflict with sec tion 10 of article 1 of the Constitution of the United States.

4. It was error prejudicial to the plaintiff in error for the sai court of appeals of Kentucky, after having fully decided that th legislative enactments and the contracts made and executed in pur suance thereto were valid and not subject to alteration, amendment or repeal by the General Assembly of the Commonwealth of Ken tucky, as was done in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort *et al.*, rendered on the 27th day of Feb ruary, 1878, and in other cases, which were in full force an
149 effect at the time the plaintiff in error made the contract i controversy and assumed the obligations therein mentioned and on the faith of which he acted in incurring the said obliga tions, now to reconsider the said decision and to divest the plaintif in error of his contract rights acquired thereunder without firs making due compensation therefor.

Wherefore the plaintiff in error, the said J. J. Douglas, prays tha he be allowed a writ of error, with supersedeas, to the Suprem Court of the United States, to the end that the said judgment o said court of appeals of Kentucky may be inquired into, reviewed and corrected, with such directions from the said Supreme Court o the United States to the said court of appeals of Kentucky as to i may seem proper, and, finally, that the said judgment of the cour of appeals of Kentucky rendered on the 16th day of December 1893, may be reversed, with directions to said court to affirm th

judgment of the Louisville law and equity court therein mentioned.

J. G. CARLISLE,
D. W. SANDERS,
Attorneys for Plaintiff in Error.

On the same day, December 29, 1893, the plaintiff in error filed in said clerk's office a copy of the following writ of error:

150 *Writ of Error.*

UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in said court of appeals, before you, being the highest court of law or equity of the said State of Kentucky in which decision could be had in the said suit between The Commonwealth of Kentucky, appellant, and J. J. Douglas, appellee, wherein was drawn in question the validity of certain statutes of the State of Kentucky enacted by the legislature thereof on March 22nd, 1890, entitled "An act to repeal so much of section eighteen of an act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March sixteenth, one thousand eight hundred and sixty-nine, as grants to the board of councilmen of the city of Frankfort the same power and authority granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February first, one thousand eight hundred and thirty-eight, and to repeal all amendatory acts in
151 relation to said grant," and section 236 of the constitution of Kentucky of 1891, on the ground that the said constitutional provision and the said act of March 22nd, 1890, being repugnant to section 10, article 1, of the Constitution of the United States, and the decision was in favor of the validity of the said statute of March 22nd, 1890, and of said constitutional provision, a manifest error hath happened, to the great damage of the said J. J. Douglas, the plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington not exceeding thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 28th day of
152 December, one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[Seal 6th Circuit Court, Ky. Dist., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Examined and allowed by—
C. BENNETT,
Chief Justice of the Court of Appeals of Kentucky.

153 At the same time the plaintiff in error filed in said clerk's office a supersedeas bond, which is in words and figures following, to wit:

Supersedeas Bond.

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Supersedeas bond on writ of error in the court of appeals of Kentucky to the Supreme Court of the United States.

J. J. DOUGLAS, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents that we, J. J. Douglas, as principal, and Jacob Hoertz, as surety, both of the city of Louisville, Jefferson county, State of Kentucky, are held and firmly bound unto the above-named Commonwealth of Kentucky, defendant in error, in the sum of five thousand dollars, to be paid to said Commonwealth of Kentucky; for the payment of which, well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of December, in the year of our Lord 1893.

Whereas the above-named J. J. Douglas has sued out a writ of error from the court of appeals of Kentucky to the Supreme
154 Court of the United States to reverse the judgment and decree rendered in the above-entitled suit before the said court of appeals of Kentucky on the 16th day of December, 1893:

Now, therefore, the condition of this obligation is such that if the above-named J. J. Douglas shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make said writ

of error good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

J. J. DOUGLAS. [SEAL.]
JACOB HOERTZ. [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me this the 28th day of December, 1893.

Examined and approved this the 28th day of December, 1893.

C. BENNETT,
Chief Justice Court of Appeals of Kentucky.

155 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the preceding 154 pages contain a true and complete transcript of the record and of the proceedings had in said court in the case of The Commonwealth of Kentucky, appellant, against J. J. Douglas, appellee, upon an appeal from a judgment of the Louisville law & equity court, as the same appears on file and of record in my office, together with the writ of error, a copy of which is on file in my office, and also copies of the application for the said writ, the assignment of errors, and the supersedeas bond, the originals of which are on file in my office.

Seal Kentucky Court of Appeals.

In witness whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 3d day of January, A. D. 1894.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $49.00.

156 COMMONWEALTH OF KENTUCKY:

Court of Appeals.

UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To the Commonwealth of Kentucky, acting through John Young Brown, its governor: W. J. Hendrick, its attorney general, and Frank Parsons, the Commonwealth's attorney for the thirtieth judicial district, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, in the District of Columbia, not exceeding thirty days from this date, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein J. J. Douglas is plaintiff in error and you are defendant in error, to show cause, if any shall be, why the judgment in said writ of error mentioned should

not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Caswell Bennett, chief justice of the court of appeals of Kentucky, this the 28th day of December, in the year of our Lord 1893.

C. BENNETT,
Chief Justice Court of Appeals of Kentucky.

157 Executed the within by delivering one copy thereof to John Young Brown, governor of Kentucky, and one copy hereof to W. J. Hendricks, attorney general of Kentucky, on the 6th day of January, 1894, and one copy thereof to Frank Parsons, the Commonwealth's attorney for the thirtieth (30th) judicial district of Kentucky, on the 9th day of January, 1894.

JAMES BLACKBURN,
U. S. Marshal, District of Kentucky.

Mar. fees, 9.90.

Endorsed on cover: Case No. 15,490. Kentucky court of appeals. Term No., 319. J. J. Douglas, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed January 25, 1894.